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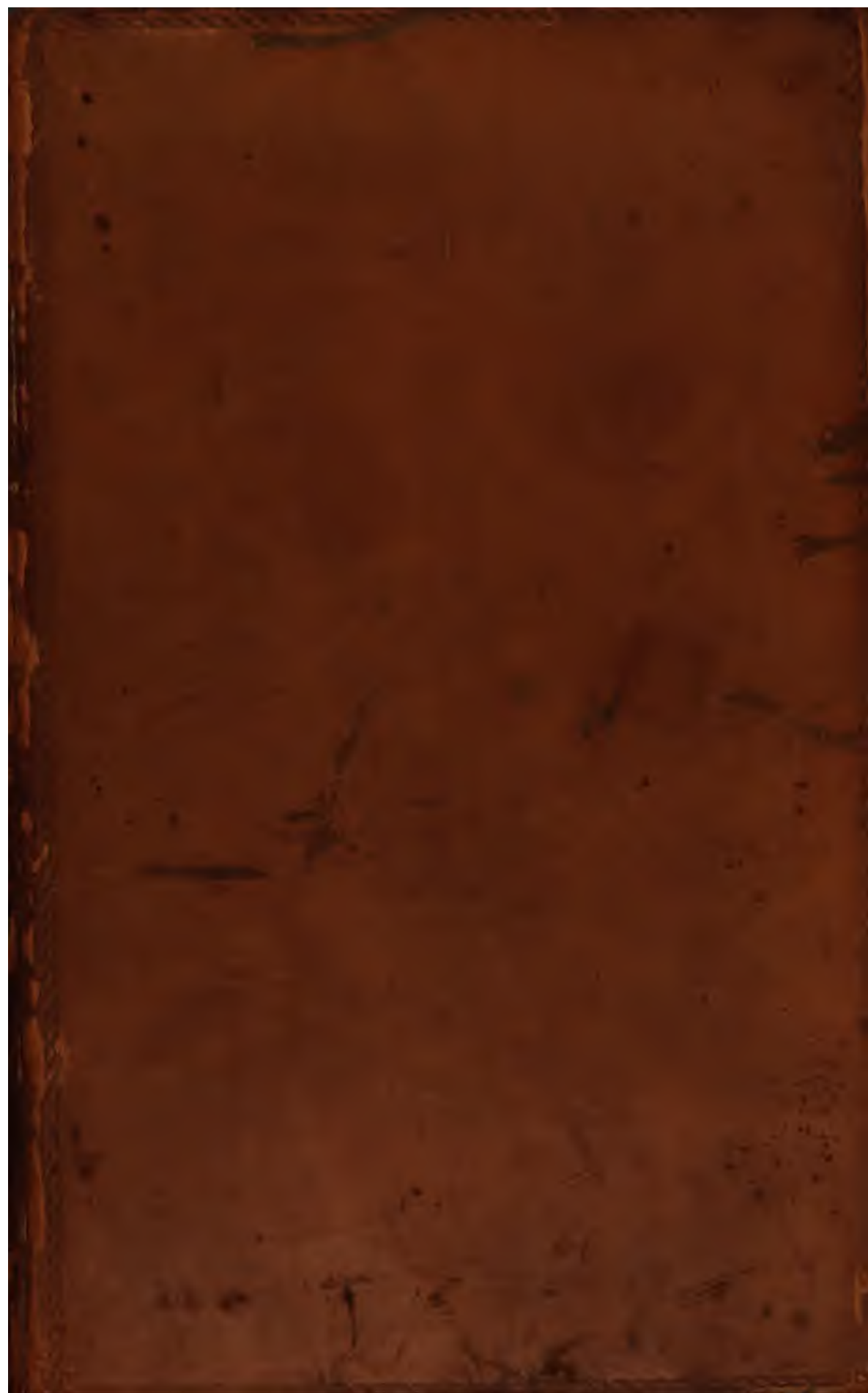
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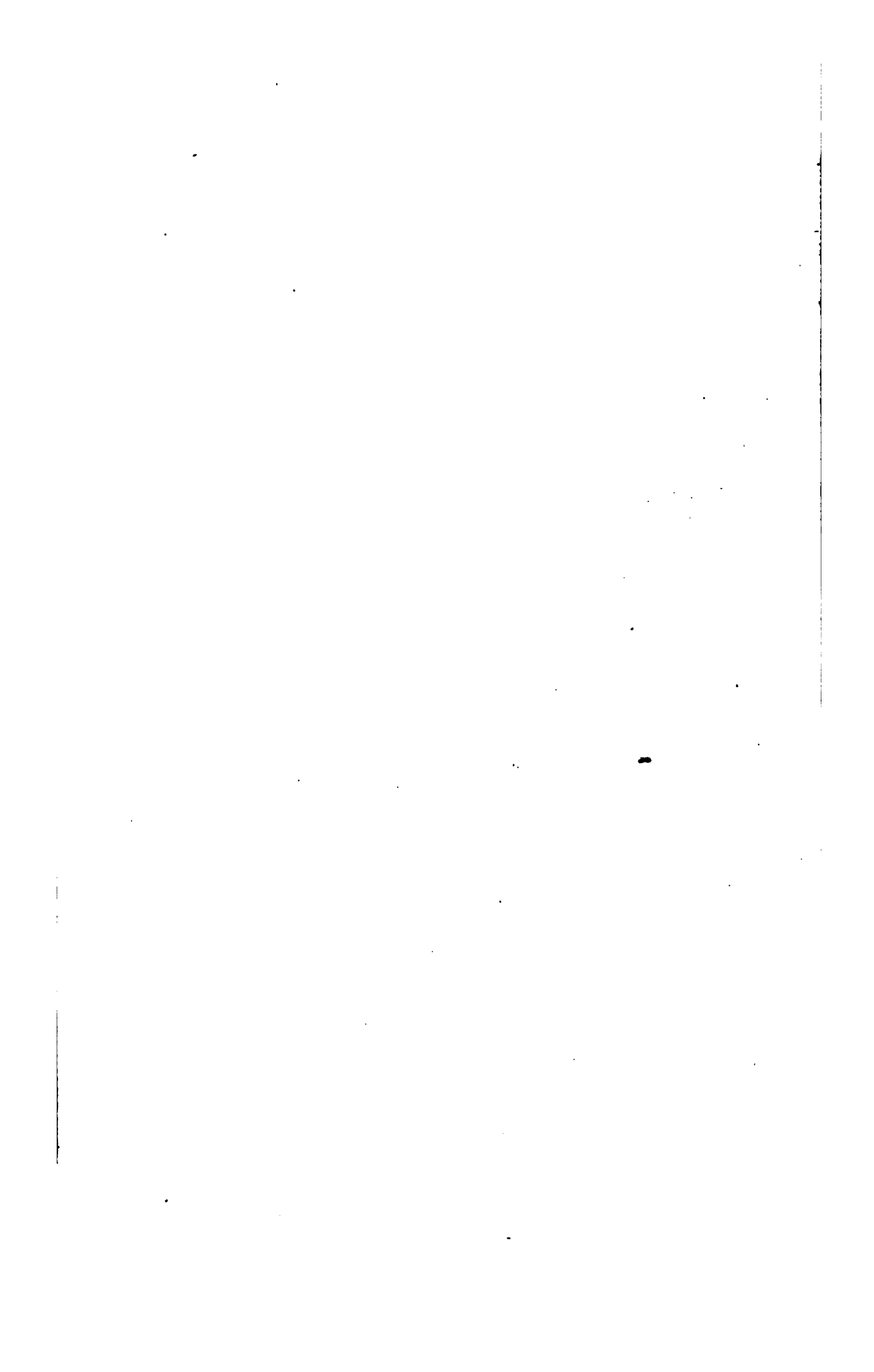
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ON

**CONVEYANCERS'**

**EVIDENCE.**

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By **THOMAS COVENTRY, Esq.**

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## PREFACE.



THE object of the ensuing Treatise is to embody the Practice of Conveyancers relating to Evidence. It is in many cases difficult to define that practice accurately; and a poll of the profession would probably yield a chequered result. In such cases an opinion only can be hazarded; and on points which appear more settled, it is possible for an Individual to be mistaken in the usages of a widely diffused and unassociated Body. A long observant Practitioner would be best qualified to undertake a work of this description; but in the absence of any such attempt, the present Writer, with unaffected diffidence, presumes to offer a record of his limited experience, in the hope that his unassuming Tract will at least afford a rallying point for the accumulation of knowledge on a very important topic to the Conveyancer.

As the authorities referred to, are only subsidiary to the main object in view, they are placed in a separate form at the end of the work.

*Lincoln's Inn,  
Mich. Term, 1831.*



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ON

# CONVEYANCERS'

## EVIDENCE.

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### INTRODUCTORY OBSERVATIONS.

THE evidence required by Conveyancers in passing a title, is of a character materially different from that required by courts of Justice. To prove a devise of lands in a court of law, the will itself must be produced; the probate will not suffice, even as a secondary evidence if the will be lost, without proof *aliunde* that it is a true copy<sup>a</sup>; but Conveyancers usually rest satisfied with production of the probate and never require any reference to the original will unless it has not been proved. This custom is so universal, that a purchaser could not, it is apprehended, resist specific performance on a refusal to produce the will; for how indeed could such production be enforced? What power has an individual to compel the ecclesiastical court to send an officer to a remote part of the kingdom merely to enable a person there to satisfy himself that his copy of the will is correct? The courts of King's Bench or Chancery<sup>b</sup> may order the ecclesiastical court to produce the will on any particular

trial or hearing, and all that the purchaser can require is a moral certainty that the document when produced will support his abstract of it ; nor could a purchaser, it is apprehended, insist on verifying the abstract with the original will at the seller's expense if the probate be ready for his inspection.

So on the proof of deeds, a court of law requires the *viva voce* testimony of the attesting witness, which a purchaser it is conceived could not insist on, unless there is reason to doubt the genuineness of the witnesses' signatures, and then it would lie with the purchaser to shew reasonable grounds for doubting the truth of the attestation. Even on the execution of powers, which depend for validity entirely on the actual presence of witnesses, it is not usual, on seeing the deed executed apparently in conformity with the power, to require an affidavit from the attesting witness that he saw the donee set his hand to the appointment, nor indeed is any evidence commonly required of the credibility of the witnesses, though credibility be made an essential qualification of the attesting party ; but if the witnesses are described as servants or dependants, or are themselves interested in the execution of the instrument, or there is no address added to their names shewing who they are and where they reside, then as credibility is required by the power, it seems reasonable that a purchaser should have this point cleared up at the seller's expense, particularly if the deed be a modern one or forms an important link in the title.

Hence it should appear that the evidence required by the Conveyancer is not that strict minute proof which

raises a conviction little short of actual observation, but merely such as affords reasonable belief that the requisite evidence exists and can be procured when wanted. It will therefore be proper to enquire primarily, what evidence is necessary to support a given deed, fact, or averment in a court of law or equity; and secondly, what portion of such evidence the Conveyancer usually dispenses with;—to say that he is at liberty to exercise a sound discretion in the requisitions he makes, is perhaps going to far; for if what he calls for is contrary to the usual practice, he is not it is conceived entitled to it.

In pursuing these enquiries we propose to treat:—

- I. Of the proof of Deeds.
- II. Of the proof of Wills.
- III. Of the Conservation and Production of this Proof; and herein of Attested Copies and Covenants to produce Deeds.
- IV. Of the proof of Titles to different kinds of Property.
- V. Of the different Characters of the Contracting Parties.
- VI. Of the Evidence relating to the discharge of Incumbrances.
- VII. Of the proof of Pedigrees, Births, Marriages, Deaths, Burials, Parish and other Registers.
- VIII. Of Secondary Evidence and necessary Presumptions;—to which may be added a few concluding Observations on the proposed Alterations in the verification of Deeds in Court.

## CHAPTER I.

### OF THE PROOF OF DEEDS.

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SECTION I. *Of the proof of Deeds thirty years old.*

II. *Of the proof of Deeds not thirty years old.*

III. *Of the proof of matters relating to Deeds generally.*

IV. *Of the proof of particular kinds of Deeds.*

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### SECTION. I.

*Of the proof of Deeds thirty years old.*

A deed thirty years old proves itself, provided it be in the hands of the proper party and the possession of the property has all along gone consistently with its provisions<sup>c</sup>. This rule is founded on the antiquity of the instrument, and the great difficulty, nay, impossibility of proving the hand-writing of the party after such a lapse of time<sup>d</sup>. It applies generally, as well to deeds concerning lands, as to bonds, receipts, letters, and all other antient writings<sup>e</sup>; which need no proof provided they have been so acted upon, or brought from such a place as affords reasonable presumption that they were honestly and fairly obtained<sup>f</sup>. Upon deeds of this antiquity therefore few remarks can be made. If they are received without comment in courts of law, their intrinsic testimony must be equally irrefragable to the Conveyancer.

In examining a title then, if it appear that by a conveyance, dated 1800, the property was conveyed from

A. to B., by a deed purporting to be properly executed, attested, stamped, and registered, if required, and that B. and his subsequent grantees have been in peaceable possession of the land ever since, and the deed itself is in their custody,—then *prima facie*, the abstract of that document requires no further verification than inspection and examination of the deed itself.

But if a deed thirty years old be not found in the proper custody, that is, in the keeping of the owner of the property, then the Conveyancer requires an explanation why the deed is in the hands of a third party; and as the only satisfactory reason for one person possessing the title-deeds belonging to another person's land without having any interest in or claim upon the land itself, is that the deed or deeds relate jointly to the separate property of each party, it is natural to infer, where that explanation is not given, or if given, is not supported by the internal evidence of the instrument itself, that the party possessing the deed has some lien upon or claim in the property; and therefore it should be required of the vendor to shew what interest the holder of the deed has in the land.

The deed must also be produced at the vendor's expense for examination of the abstract, and if the holder will not bring or send it to the purchaser (which it is not very likely he will do), the purchaser's solicitor may, after notice to the vendor that he is about to pursue this course unless the deed is forth-coming within a reasonable and specific time, make a journey to the holder of the deed for examining the abstract therewith; and on that occasion he should enquire of the possessor of the

instrument, whether he has any and what lien or claim upon all or any part of the premises about to be purchased,—stating distinctly at the same time, that his client is about to purchase all or a specific part of the property; for without such intimation the enquiry will be unavailing as against the holder of the deed claiming any lien upon or interest in the land; and the expense of such journey may be recovered of the seller.

If it appear that the deed does relate to other property claimed by the holder, or if he has any admitted interest in the land, then the instrument is in its proper custody, and being thirty years old proves itself; but if a person in possession of a deed thirty years old be not also in possession of the property to which it relates, then the document *prima facie* appears out of its proper custody. It may however turn out that the possession of the land is not in the true owner; but as the Conveyancer never completes the purchase of an immediate estate, without being assured that possession will be delivered on execution of the conveyance, it is not enough for the seller to produce a deed thirty years old evidencing a conveyance in fee to himself, if he cannot on execution of the conveyance made by him, perform his covenants by delivering and warranting quiet and peaceable possession. In such case he must first apply to a court of law or equity to obtain possession before he can make a good title; then, whether a court will admit the deed without proof of its execution, will depend on the length of time he has been out of possession. If he has never been in possession nor has been under any legal disability, then, having slept on his rights for thirty years, he clearly has no remedy in equity, and a court of law, it

is presumed, would require something more than bare production of the deed to disturb the possession of an acknowledged owner under so matured a title.

To put the case ;—Suppose A. seised in fee in 1800, to make a voluntary conveyance in that year to his youngest son B. in fee, to give him a qualification to shoot or vote or for some such like purpose (which would be good enough against himself and those claiming under him<sup>s</sup>), and shortly after the father to die, and his eldest son and heir to succeed to the property, without any claim on the part of his youngest brother, and to keep possession of the estate for thirty years ; then could B. in 1831, set up the conveyance from his father in a court of law (in a real action of course as he would be barred of his ejectment), and support his title without some proof of the due execution of the deed? It is presumed a court of law would require strict evidence of the grantor's signature by the attesting witnesses, if living, or if dead, by indubitable proof of their hand-writing. It surely would not be enough for the plaintiff to produce the deed merely, without shewing that he once had possession under it ; and if he ever had possession, or received one quarter's rent, or was polled as owner, or justified a trespass as thereby qualified, *that* would be evidence of ownership under the deed, and if thirty years have run against this seisin in himself, he would be barred of his remedy at law by the statute of limitations<sup>h</sup>. But if he never had possession, then he may count on the seisin of his predecessor for fifty years. The ultimate result of his title however is not within the scope of the present observations, nor is it material to enquire in this place, *whether* a court of law would admit the



document on its own merits, as it is clear no Conveyancer would accept the title of the younger son on the evidence of the deed merely, unaccompanied by possession. If the contract were for the reversion during the lifetime of the tenant for life, that is another and quite a different case, which we shall presently notice.

Again, suppose an estate be limited to A. for life, remainder to B. in fee ; and in 1800, B. to convey his reversion in fee to C. ;—then if A. dies in 1831, and the tenant in possession compels C. to bring an ejectment to recover possession, production of the conveyance of 1800, now thirty years old, would, it is conceived, be sufficient evidence of the lessor's title as against the tenant merely holding over ; but if the tenant claim adversely, as if he set up a conveyance from B. of a date anterior or subsequent to that of C.'s conveyance, certainly if anterior,—C. would be called on to prove the due execution of his conveyance, as also must the tenant shew the legality of *his* ; the prior in point of date would prevail. This appears to have been the question in the case mentioned by Buller, Jus., where a man conveyed a reversion to one, and afterwards conveyed it to another, and the second proved his title ; here the first was required to prove his deed though it was 40 years old ; for in such case the presumption arising from the antiquity of the deed is destroyed by an opposite presumption ; for no man can be presumed guilty of so manifest a fraud as to make a second conveyance of land which he has conveyed away before without actual proof of such prior conveyance<sup>i</sup>. But this point also, is without the pale of the present enquiry—the con-

tract being for an estate in possession, and then the purchaser may rescind his contract if he cannot have immediate possession or he may wait till the vendor can procure possession by legal means.

The title of the contending parties in the lastly mentioned case must have commenced within thirty years of the deed or will creating the life estate and remainder. On completion of their respective purchases, it behoved them to take precaution against the possibility of the supposed fraud; which however nothing perhaps could have frustrated, if the holder of the title-deeds were in league with the remainder-man, or due inquiries were not made of such possessor as to the evidences of title, or no memorandum of the first sale and conveyance of the reversion were endorsed on the settlement or probate, or notice thereof was not given to the trustees or holder of the title-deeds. This, also, is irrelevant to the subject in hand; but it may occur that C. during the existence of the life estate and thirty years after his original purchase, contracts to sell his reversion to D., and in evidence of his title, abstracts the original settlement, creating the reversion (to which he procures access for himself and purchaser), and also the deed of conveyance from B. to C. which being thirty years old and in the proper custody, would in a court of law require no actual proof. This deed would of course be handed over to the purchaser, and he must give it the same credence as a court of law would do, namely, receive it without proof of actual execution, which indeed would little avail against a conveyance by B. made prior to that to C.

Against such a

Conveyance no foresight could pro-

vide.—If any other person than the tenant for life were in possession, it would be proper to inquire of whom such occupier held; but he may fairly answer, of the tenant for life without disclosing his own conveyance of the reversion if he held such, unless he were told that the enquiry was made by a purchaser of the reversion, then if he remained silent as to his own conveyance, he would be guilty of culpable concealment, and in equity he would be postponed to the party whose precautions he had thus contributed to render unavailable. But the prior conveyance may have been to a stranger, who may be patiently waiting for the determination of the life estate to take possession. On that event, a collision of interests would ensue, and no precaution respecting proof of the conveyance from B. to C. could assist D. in this trial of his title.

It was not culpable negligence in the first purchaser to omit procuring an endorsement on the settlement attesting his purchase, and there were no deeds which he could legally insist on possessing. The only answer to the second purchaser, if he loses, is, that his contract was for a reversion,—all dealings in which are exposed to risks of this kind;—his remedy is against the seller for a breach of the covenants contained in his conveyance; but after a lapse of so many years, that remedy would be rather perhaps a shadow than a substance.—If the proposed Registry Bill pass, frauds of this sort will be prevented, or may at least with due diligence be easily detected; and it should be remembered that the same kind of fraud may be practised with a reversion a year old as well as with one of thirty years standing.

The truth is that the Conveyancer has little to do with the execution and attestation of deeds. If they purport on the face of them to be properly executed and attested, then, whether they are thirty years old or only one, he takes for granted, on premises presently adverted to, that the signatures subscribed and endorsed are the genuine production of the parties whose names they import.

As an exception to the rule respecting the presumption of the due execution of deeds thirty years old, it is observable that if any material erasure or interlineation appear on the face of the instrument, the deed must be proved, and the blemish explained; for the question is whether the erasure or interlineation was made before or after the delivery of the deed, and none are so competent to speak to this point as the subscribing witnesses, who though they do not peruse and are not presumed to be acquainted with the contents of the deed, can yet speak to the fact whether there was any alteration or change in the agreement in their presence when the parties met for settlement. In the absence of any direct proof of the fact, the presumption is, that the questionable matter was introduced prior to the execution.

The rule, that deeds thirty years old prove themselves is so well established, that if the subscribing witness be in court and ready to be examined in verification of the instrument, his testimony, if tendered, will not be received; for the court will not break in upon a rule of evidence so conducive to convenience, and so consonant with reason and principle and the frailty of human nature. In one case, indeed, Mr. Baron Perrot is said to have ruled, that though a deed may be read in

evidence on account of its antiquity, yet, if on the other side it is shewn, that one of the witnesses is alive, he must be produced or the deed be rejected; and he cited a case where a deed was produced in the King's Bench, and it appeared that Sir Joseph Jekyll was the subscribing witness, upon which the court said they knew he was alive, and that if he did not come to prove the deed, the plaintiff must be non-suited. It was then mentioned to have been ruled by Mr. Justice Yates<sup>j</sup>, that for the sake of practice, the witness should not be allowed to prove an old deed, even if he attended for the purpose; but Perrot B. retained his opinion: saying 'That an old deed is admitted only on a presumption that the witnesses are dead, but when the contrary is made to appear they must be called<sup>k</sup>.'

It is however observable that courts of law have adopted this rule not on the presumption of a *fact* (which would be for the consideration of a jury rather than the court), but as a general maxim of law, on account of the great difficulty of proving the execution after an interval of so many years<sup>l</sup>; and there appears no inconsistency in acting generally upon this principle, though in a particular case the subscribing witness may be proved to be alive, at the same time leaving it to the opposite side to dispute the regularity of the execution by calling him or any other witness to shew that irregularity if it exist.—Unless therefore a purchaser has from other circumstances reason to doubt the genuineness of deeds thirty years old, his legal adviser has only to see that the instrument bears the impress of honesty,—is in the proper custody,—and that possession has accompanied the provisions it contains.

## SECTION II.

*Of the proof of Deeds not thirty years old.*

Deeds not thirty years of age require also much less formal verification in the Conveyancer's chambers, than they do in courts of justice. The object of the Conveyancer is to see that there is reasonable probability of the stricter evidence being forthcoming when called for, rather than to scrutinise the evidence itself. The security thrown around the authenticity of deeds by the criminal law, is to him a sufficient safeguard against the evils which courts of justice by a laboured process endeavour to prevent. As long as the necessities of a commercial nation require that forgery should be an *unpardonable* offence, the presumption is in favour of the genuineness of the signatures attached to such solemn assurances as deeds. The Conveyancer acts upon that presumption, and dispenses with the testimony of the subscribing witnesses. It is, under such circumstances, more natural to presume that the signatures and attestations are true and correct, than that they are false and counterfeit,—the presumption to the contrary, made by the courts has led to much trouble and inconvenience; which the common law Commissioners in their second report have not failed to notice. Any laxity indeed in the visitation of such crimes with the severest punishment, would occasion the greatest possible insecurity to titles in a country where the alienation of landed property is encouraged to its utmost extent.

Where therefore a deed is produced from its proper custody, and the possession of the property has been

and is in accordance with its provision, it is fair to infer that such an instrument, bearing all the marks of authenticity, is in reality what it professes to be, the act and deed of the parties signing it, performed in the presence of the witnesses whose names are subscribed. This inference then not exceeding the bounds of reasonable probability, it becomes unnecessary to call for and examine the witnesses personally ; particularly as their actual attendance in court can be compelled when wanted by *subpoena ad testificandum*.

But it may happen that the witnesses are dead, and that expensive evidence would be requisite to prove their hand-writing, especially if no address be added to their names or their residence be stated as in a distant part of the country;—why then should not the purchaser be satisfied that the witnesses are alive ; or if dead, is it unreasonable for him to call for evidence of their hand-writing at the seller's expense ? One short and conclusive, though not perhaps satisfactory, answer to these questions is, that it is against the usual practice to require of a seller any such proof ; and that being the case, the purchaser, it is conceived, could not successfully resist specific performance of his contract for want of such confirmatory evidence. On the score of inutility, inconvenience, and expense, also, the vendor may doubtless overcome such a novel requisition ; for it would be monstrous if he could be compelled to prove thus strictly, ten or a dozen deeds or perhaps more which may have been made of the property in sale during the last thirty years. Such a demand would in many cases be equal to the value of the property ; to say nothing of the inconvenience of the witnesses' jour-

nies and the attendance of persons to receive the tendered testimony; and if upon every succeeding sale such a course could again be required, the fee simple of the land would shortly be swallowed up in law expenses—heavy and unpopular as they already are without this additional incentive to a well known outcry.

Then *cui bono*? of what service could such evidence be, taken as it necessarily must be without the sanction of an oath. Voluntary affidavits are uniformly disregarded in courts, and a purchaser would have no remedy for perjury. If then a deed under thirty years of age, appears to be fairly executed and attested, the Conveyancer presumes that the witnesses when called will depose to the fact of the grantor's signature; and that if the witnesses are dead, certificates of their burial and proof of their hand-writing can be procured. But this being merely presumption, is liable to be rebutted by shewing reasonable grounds for impeaching the genuineness of the deed, which then becomes an objection to the title rather than a requisition to produce the witnesses; and though a voluntary affidavit by one of the witnesses (the only means perhaps by which a defect of this nature could be remedied) is of no value in a court of law, yet such documents go a great way in dispelling doubts, and are frequently called for by counsel as evidence of upright dealing and as affording some probable security against fraud.

The evidence then required by the Conveyancer concerning the authenticity of deeds, being merely the internal testimony of the documents themselves, confirmed by concurrent possession, it is unnecessary in



this place to enter very deeply into that stricter kind of proof which courts require when the legitimacy of the title is disputed; and this is the less necessary as the subject is fully detailed in two excellent works on legal evidence, the one (and I think the best practically) by Mr. Phillips, and the other more succinct and combined by Mr. Starkie.

It is sufficient to say, that in ejectment the lessor of the plaintiff recovers on a possession within twenty years preceding the action brought. He must therefore shew a possession in himself or in those under whom he claims within that time. Having shewn *that*, he must prove his title from that period—not for a period of thirty or even twenty years anterior to the commencement of the action, but only from the time he, or those under whom he claims, were last in possession. If any deeds occur in the interval between the last receipt of rent by those under whom he claims and the commencement of the present action, (which are not within the purview of the statute against buying pretended titles unaccompanied by possession<sup>m</sup>), those deeds will require proof by one at least of the attesting witnesses; if there are no subscribing witnesses, then by the testimony of a bystander who saw the deeds delivered. The acknowledgment of the grantor that he sealed and delivered the deed is considered as only secondary evidence, and inadmissible until it has been shewn that the best and usual evidence does not exist or cannot be procured. If therefore there were no witnesses present at the time the grantor sealed and delivered the deed<sup>n</sup>, the execution could only be proved by the grantor himself, and his testimony would in such

case be doubtless let in, and certainly he is competent to give evidence against himself. If he be dead, then evidence of his hand-writing would be admitted; but some evidence of the sealing and delivery should in that case seem to be requisite, which, if no one were present, could not very well be given. In one case, where the names of the subscribing witnesses were proved to be fictitious, Lord Kenyon said, that the plaintiff was at liberty to give evidence of the defendant's hand-writing, and the bond was so proved. Hence appears the necessity of having one witness at least to the deed, who shall attest in writing the facts of sealing and delivery, and whose attendance, if living, can be easily procured, or if dead, whose hand-writing may be readily proved; which being satisfactorily shewn, is considered sufficient evidence of the authenticity of the deed and of the sealing and delivery, without any proof of the hand-writing of the parties.

In a real action, the several links of the title from the last seisin must be proved; and in chancery, where the question in dispute is a matter of right and not merely a reference to ascertain whether a good title is disclosed by the abstract, the deed may, on motion after answer, be ordered into the master's office; then those instruments which either party intends to rely on, must be proved in the usual way, except that in chancery this proof is collected and preserved by interrogatories answered on oath before an examiner appointed for the purpose. All this however is to a considerable extent irrelevant to the subject in hand. The evidence principally regarded by the Conveyancer is that concerning collateral facts and averments. The authenticity of the deeds themselves he takes for granted, and looks only

to their construction and effect. It is to the facts recited or implied by those deeds, and other collateral circumstances, that his attention is chiefly directed in regard to evidence;—such as deaths, pedigrees, intestacies, enrolment, registration, stamps, consideration, ability of the parties, &c.;—of these he requires equally full and strict proof as courts of law, and it is to this species of evidence that the present remarks are particularly addressed.

In pursuing our inquiries concerning the evidence required by Conveyancers in respect of deeds, it may perhaps be as well to consider a few particulars which relate to all deeds, and then to advert to any peculiarities which may occur in the consideration of Deeds in particular.

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### SECTION III.

#### *Of the proof of Matters relating to Deeds generally.*

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|---------------------------|-----------------------------|
| 1. <i>Execution.</i>      | 5. <i>Parcels.</i>          |
| 2. <i>Interlineation.</i> | 6. <i>Deeds executed by</i> |
| 3. <i>Registration.</i>   | <i>Attorney.</i>            |
| 4. <i>Stamp.</i>          | 7. <i>Counterparts.</i>     |

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#### 1.---*Of the Execution of Deeds.*

The execution of a deed consists in the grantor's signing, sealing, and delivering or acknowledging it as his act and deed in the presence of witnesses. The delivery or acknowledgment of the deed is the principal point to prove; for if that be shewn, the signing and sealing will be presumed, unless the contrary appear. Witnesses to the execution are not absolutely necessary,

but as a matter of precaution, it is best to procure their attendance, otherwise much difficulty might ensue if the grantor should afterwards deny his own assurance.

Sealing is of the essence of the deed, while signing is not; for no instrument can be a deed without a seal, whereas at common law, if the writing be indented, sealed, and delivered, it is a good deed without any signature; indeed, antiently, few persons could write, and to have required signing in that age would have rendered property altogether inalienable. The statute of frauds<sup>p</sup> requires all agreements, leases, assignments, surrenders, and grants of freehold and copyhold estates and interests to be by deed or note in writing, *signed* by the party or their agents thereunto lawfully authorised by writing or by operation of law. It is difficult to see what species of deed these words will not embrace; yet it has been said that deeds do not require a signature by this statute; for that the act is applicable to agreements only<sup>a</sup>;—a position requiring very mature consideration before it is acted on.

The mode of proving deeds in court by the testimony of the subscribing witnesses, is laid down in several modern works, treating exclusively of legal evidence, and will not therefore require repetition here. The Conveyancer presumes that the facts stated in that common conclusion to the abstract of a deed, 'duly executed and attested and receipt for consideration money endorsed,' are true. The attestation clause sometimes states that the deed is only sealed and delivered; still if the deed is actually signed, the presumption is that the signatures were made in the presence of the subscribing witnesses. If by any casualty the deed appears not

signed by any particular granting party, but only sealed, that is, suppose a seal be attached to which no name is affixed, and the attestation records the sealing and delivery of the deed by that party, then it must be considered whether signing is rendered essential by the statute of frauds, as it clearly is not by the common law; and if signing be essential, then if the party be living and will actually sign and deliver the instrument, *that*, with a special attestation stating the facts, would, I should think, cure the defect; but if the party be dead, then a conveyance by his heir at law or devisee, seems the only means of completely obviating the difficulty.

If signing be required by a power, and it does not appear by the attestation that the deed was signed, but only sealed and delivered, that *prima facie* is not a good execution; but evidence is admissible to show that the donee actually complied with the terms of the power; and where in the body of the deed it was stated, that the donee by this his deed signed, sealed, and delivered, appointed, &c. and the attestation failed to express the fact of signature, Lord Eldon thought there would be a miscarriage in a judge directing a jury, if the fact of signature was found, not to presume that the deed was signed in the presence of the witnesses that it professed to be, and therefore he considered the attestation in that case good<sup>a</sup>. The doubt is, not whether powers required to be executed by deeds signed, would be well executed where the attestation expresses the facts of sealing and delivery only; but whether such powers would be well executed where they are required to be exercised by deeds signed and *attested* by witnesses.—This doubt occasioned the Act 54 Geo. iii. c. 168, July 1814, which is retrospective

only, and in time will become quite useless.—At present a period of near twenty years is without its operation. The author of it is understood to have some amendment in prospect.

Sealing also, though of the essence of the deed, will be presumed, and *that*, not only in cases where the deed is lost or torn, but also where no mark or impression on the parchment or paper appears, provided the attestation notice the solemnity of sealing to have been complied with. The reason is, that to constitute sealing, the use of wax is not essential: it is sufficient if the seal be impressed by the party on the plain parchment or paper with an intent to seal, without making or leaving any impression or indentation<sup>r</sup>.

In like manner, the delivery of deeds will be presumed, unless contradicted by particular circumstances. In a late case, the attesting witness to a bond, not having in reality either seen the execution by the obligor, or heard him acknowledge it, was of course unable to prove the validity of such execution; the evidence of another person who saw the obligor sign, coupled with the circumstance of a declaration incorporated in the instrument, stating it to be sealed by him, was held sufficient to warrant the jury in presuming that the deed had been regularly sealed and delivered<sup>s</sup>.

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2.---*Of Interlineations, Alterations, and Erasures.*

These for the most part are noticed in the attestation, and to obviate all doubt as to the time when they were made, this precaution should seldom be omitted.

And care should be taken to notice all the alterations; for if some are inserted and others omitted, the strong inference is, that these latter were not made when the attestation clause, thus particularising the erasures, was prepared. The general rule is, that erasures and interlineations in a material part after execution avoids the whole deed<sup>t</sup>; but it is for a jury to say what is a material alteration. If the interlineation or erasure be made by a stranger, the additional or altered matter simply, is void, and not the whole deed<sup>u</sup>; but if the deed be altered by a party (the obligee for instance), although in an immaterial part, he thereby avoids the whole instrument<sup>v</sup>. It has been said that an alteration by a stranger in a material point will avoid the deed, for that the witnesses cannot prove it to be the deed of the party where there is any material variation; but this position may be fairly questioned; for as the act of a stranger in tearing off the seals does not vitiate the deed, it is difficult to say why his alteration of it should avoid it. An alteration in any covenant will avoid the whole deed, for the deed cannot be the same unless every covenant be the same<sup>w</sup>.

An interlineation or addition if made before delivery, constitutes a part of the deed and is therefore good. And every erasure or interlineation will, it is apprehended, be presumed to be made before the execution of the deed unless the contrary appear. In the case of *Fitzgerald v. Fauconberg*<sup>x</sup>, an interlineation by which a power of sale was enlarged, was presumed to have been made at the time of the execution of the deed and not after, nothing appearing to the contrary. In the case of *Paget v. Paget*<sup>y</sup>, blanks in a deed were filled up after its execution, and though the deed was not read

again to the party nor re-executed, it was held good. And it is clear that an interlineation or alteration adopted by the initials of the parties will not avoid the deed<sup>a</sup>, or require a new stamp, provided such interlineation or alteration be made at the time of the delivery of the deed or before the parties separate.

Thus, where a lease was made between three parties, lessor, lessee, and a directing party; and after the lease had been executed by the latter, the parcels were altered, by striking out of the description a particular piece of ground, with the privity of both lessor and lessee, before execution, as appeared by the evidence; but no notice was taken of the alteration in the attestation; the lease however was held good; nor was the question considered as affected by the stamp act<sup>a</sup>.

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3.---*Of Registration.*

The usual and proper evidence that a deed has been duly registered, is the memorandum endorsed on the back, signed by the deputy registrar. The signature of the worthy and respected gentleman who has held the office of deputy registrar in the county of Middlesex, with great urbanity and attention for so many years, is well known. By the sixth section of the Middlesex Registry Act<sup>b</sup>, and the the twelfth section of the York Registry Act<sup>c</sup>; it is declared that this certificate endorsed, signed by the registrar, shall be taken and allowed as evidence of such respective registries in all courts of record whatsoever. This signature of the deputy registrar, is therefore the only evidence of the fact which the purchaser can require; but if no memo-



randum of registration be endorsed, or the memorandum be not signed,—a species of neglect not easily conceivable, the purchaser may require the registry to be searched, and a certificate of the result of such search procured and delivered to him at the vendor's expense; and it will be for his legal adviser then to consider, what effect the want of registry of any particular deed or will may have on the title. The consideration of that question belongs to another department of law, on which several excellent collections of cases and essays are extant.

But though the memorandum of registration endorsed, be thus made evidence of the fact, yet registration is not in itself notice, unless it can be proved that the party to be charged with the notice, actually searched the office by himself or his agents.

On a review of this doctrine, these points may be collected :—

1st. That registration is not in itself notice.—2nd. That a mortgagee or purchaser is not *bound* to search the register office; but if he does, he will be held to have notice of all incumbrances on the register within the period of his search.—3rd. That a mortgagee having the legal estate, may tack further advances to his security, notwithstanding a mesne conveyance may have been duly registered.—4th. That an equitable encumbrancer, without notice *aliunde* the registry, may overreach a prior equitable and registered mortgage, by purchasing in a legal estate created previously to both incumbrances.—5th. That actual notice of an unregistered deed will not bind the party to whom such notice is given, unless his own incumbrance be not duly registered; but as between claimants for value,

the question as to the proper effect to be attributed to notice of a prior unregistered deed, is one of great difficulty, and upon which the opinions of able and experienced men are divided. This question is fully discussed in the second report of the real property Commissioners. It may be added, 6th. That these positions are in effect the very reverse in Ireland, on account of the Irish registry act declaring that every deed in Ireland shall have priority according to the time of its registration<sup>c</sup>.

When a deed or grant of land in a register county is presumed, a question naturally suggests itself, how can the grant be good if the deed does not appear on the register? The fact is, that the registry acts do not make it imperative on parties to register their deeds, but only say that it shall be lawful for them to do so if they please,—it is not added that the deed shall be void if it be not registered; so that a surrender of a term may be good though it does not appear recorded in the registry office, and if such a surrender be presumed, the want of notice of the deed in the registry office cannot of itself rebut that presumption<sup>d</sup>. So presumption of the grant of a right of way, is not affected by the want of any note of the grant appearing in the register office; for such a grant may have been made and never registered, and it will notwithstanding be good. In short, purchasers may withhold registering their deeds if they chuse to run the risks of non-registration, which are however few and improbable.

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4.---*Of Stamps.*

No deed can be given in evidence unless it be properly stamped<sup>e</sup>. It should therefore appear to be an

important duty of the Conveyancer to see that each deed in the abstract is impressed with this passport to belief. Such however is not the Practice, and strange to say, mention is scarce ever made of the stamps in the abstract, nor does the Conveyancer usually concern himself about this essential requisite to the credit of the assurances recited, or make any enquiry or remark respecting the amount or number of the stamps affixed to the various instruments abstracted. He presumes that the parties who have undertaken to prepare the abstract, have satisfied themselves on this point; and unless any special remark is added by the solicitor, calling attention to any supposed want of conformity to the stamp acts, no observation is made by counsel as to the admissibility of the deeds in evidence.

Formerly, the deeds themselves were transmitted to the Conveyancer's chambers, and he not only gave his opinion on the effect and construction of the several deeds, but prepared an abstract of them in a form much more concise and piquant than they are now frequently found. He could also express a more confident opinion on the merits of the title; and the deeds being carefully perused by the eye of an experienced lawyer, all latent and obscure blemishes and defects were detected, which now it is feared are too often unconsciously slurred over. It is clear that the opinion of counsel depends entirely on what is stated to him in the abstract, and it is equally clear that an experienced lawyer is more capable of detailing the effect of a complicated assurance than an inexperienced apprentice.

Whether from the difficulty or danger of transmitting title-deeds to valuable estates by common

carriers, or from aversion in the proprietors to part with the evidences and 'sinews' of their land farther than the tether of their attorneys, or whether by encroachment on the province of counsel, or by the extinction of that class of conveyancers who formerly practised under the bar, the preparation of the abstract became confined to the office of the solicitor, it is now immaterial and indeed unimportant to enquire; it is sufficient to say, that abstracts are now usually prepared by solicitors, and it is feared that inadequate attention is sometimes paid to the sufficiency of the stamp on the various instruments abstracted.

To form any correct opinion on this head, the schedules to the numerous stamp acts would require inspection, and the still more laborious task of counting the number of folios is encountered; and after all, experience shews that injury seldom accrues from any laxity in this particular; for it should be observed, that the stamp acts do not absolutely annul instruments improperly stamped, but merely render them unavailable in evidence. Now if possession accompany the deed, the party has rarely any occasion to tender the deed in evidence; and in any hostile proceeding, the presumption would be that the deed was properly stamped until the contrary is shewn, which the other side could not very conveniently or effectually do on the spur of the moment. Even in attested copies, the stamp of the deed copied is rarely mentioned, so strong is the presumption in the minds of most people that the deed is properly stamped. It is only with respect to the stamp on the intended conveyance that counsel's attention is sometimes drawn, and *this* from the nature of the instrument and the obscurity of the schedule, occa-

sionally gives rise to complicated questions of construction.

Another reason why the stamp on the various deeds composing the links of the title is seldom noticed in the abstract, is that in practice the deeds are rarely examined till the counsel has pronounced an opinion on the title generally. As the purchaser is at the expense of this examination, his solicitor is desirous of avoiding the cost of journies, attendances, &c. to peruse the deeds, until he is apprised by the opinion that the title is in the main unobjectionable.

But the question is, whether the want of a proper stamp on a deed twenty or thirty years old, forms in itself a valid objection to the title? The deed without any stamp at all, is a good conveyance of the estate at common law, and the right of property is undoubtedly passed by it, then if the right of possession accompany that right of property, and both, (with actual possession and the title-deeds) are ready to be delivered and conveyed to the purchaser, who? it may be asked, could legally molest him in the enjoyment of the property, that is, supposing the title entirely unobjectionable in other respects. He must at all events be defendant in any action brought against him, and his opponent must recover on a superior title, which by the abstract the purchaser is assured cannot exist: if he be turned out of possession after the contract completed, by a person having no title, his more summary remedy is by indictment for the forcible entry, and the same remedy would, it is apprehended, lie against an abator or intruder, who though he does not commit any actual force in the entry, is still by unlawfully withholding the possession

from the rightful owner, guilty of a forcible retainer, which is much the same thing.

This, however, is not the point. Could the heir or devisee of the grantor of the deed improperly stamped, or the grantor himself, commence an action with any prospect of success against the purchaser? Must not some evidence be adduced in support of any allegation of right in the plaintiff before the defendant would be called on to produce the merits of his title? These parties at all events, would be estopped from gainsaying their own solemn acts, and the deed itself though no evidence of the conveyance might be produced as evidence of the contract. Could any dormant incumbrancer impeach the title on account of this want of stamp on an antient deed? it is apprehended not;—he must recover if at all, on the validity of his own assurance *dehors* this objection, of which he could not by any probable supposition have become acquainted. Then on a bill for specific performance, would the Master presume the possibility of the title being drawn in dispute, when on the face of the abstract every thing conspires to rebut that presumption. A restive tenant could never raise the question, for the deed being more than twenty years old, his ejectment is secure. And in a writ of right, the purchaser has fair and reasonable evidence that no one could prove an adverse seisin within a period of sixty years, the supposition being that the title during the usual period is in other respects unimpeachable. It is then submitted, that the mere want of a proper stamp on a deed twenty or thirty years old, forms in itself no valid objection to the title, nor does it present any real risk to the purchaser.

It is not the object of this essay to treat in detail of the various subjects which necessarily fall within its range, but only to advert to such parts of each topic as relate to the description of evidence we are discussing. The observations, therefore, prepared for this place, respecting some points on the stamp laws recently questioned, particularly as to the proper stamp on transfers of mortgage, must be postponed to a more fitting opportunity.

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*5.---Of the Parcels.*

The identity of the parcels is an object of great concern with the Conveyancer.—He requires first, that there be a reasonable correspondence between the ancient and modern descriptions, and second, that the lands themselves be clearly distinguishable by the description given. This latter point lies within the province of the solicitor rather than of the abstract counsel, who is necessarily confined to the descriptions on paper. In wills and settlements the property is often described in general terms, as ‘all my land,’ or ‘all the lands in the occupation of A.,’ which makes it necessary to inquire, what lands were occupied by A., or what lands were the property of the testator.

By a well-known rule, all resort to extrinsic evidence in the construction of written instruments is excluded, but where there is an obvious ambiguity of expression, a reference to the actual state of the facts is not construction but explanation, and on this principle, parol evidence, shewing the situation or occupation of the

lands at any given time, has always been admitted. Therefore when parcels were described as 'all those brick-works in the occupation of the plaintiff,' the court of Exchequer said, this is an ambiguous expression, and what are the brick-works must be collected from something out of the four corners of the agreement? The parol evidence tendered, namely, declarations made by the plaintiff to a third person, defining the lands in question, was then received<sup>f</sup>

The most direct means of proving the lands to have been in the occupation of a particular person at any given time, is an old lease or other evidence of a tenancy between him and the owner; and this is incontrovertible even in court, without evidence, as it should seem, either of the execution of the lease or agreement, or of actual occupation under it<sup>s</sup>. So old parish rates assessed upon the occupiers of lands within the parish, are admissible in matters of boundary, without shewing payment of the rates assessed; but these assessments are more appropriately adduced in proof of seisin than of identification,—the contents and boundaries not being given, though mention is frequently made of the aggregate amount of acres.

Where lands are conveyed by one deed to different sets of uses, it is essential to observe that the words introducing the uses, specifically refer to the lands intended to be affected by them. These words are usually nothing more than a short reference to the names or occupations of the lands, and though considerable latitude would no doubt be allowed in construing them to embrace the lands obviously intended, yet where the last set of uses takes in all that is <sup>not</sup> before mentioned, it is



particularly essential to observe what the other clauses clearly comprehend.

In a case within the writer's recollection, it appeared that many years ago, a small farm had been enlarged by the addition of several closes, equal in numerical amount to the farm itself.—In this shape, the owner sold the whole to a purchaser as one entire farm, describing it by the name which the small farm originally bore. The purchaser granted a lease of the lands by that name, which now by common reputation had become the name of the whole farm. Having other lands in the same parish, he afterwards by a deed of voluntary settlement, conveyed all his landed property in the parish to trustees and their heirs, upon the following uses :—As to the farm and lands called A., in the occupation of B. (meaning the said consolidated farm and mentioning the lessee's name). To the use of C. and his heirs ;—And as to all the residue of the said lands thereinbefore described, To the use of D. and his heirs. C. entered and occupied the whole of the lands in B.'s occupation, and subsequently brought the title to market to borrow money upon ; when it was objected as doubtful, whether the description of the lands, 'as all that farm called A.' would include more than the original farm called by that name, and not the additional closes laid thereto by the former proprietor. The conveyance of the united farm to the settlor, gave other general descriptions, which clearly included all the lands, but in the settlement, the first set of uses were made to apply to 'the said farm and lands called A. in the occupation of B.,' which it was thought could not include lands only known by that name within time of memory, especially as there were other lands actually

bearing the name mentioned, sufficient to satisfy the description; and the words were, not 'all the lands in the occupation of B.,' but only 'the farm called A. in the occupation of B.,' which could not, it was said apply to lands which formed no part of the farm, though they were in the same occupation. The writer of these observations had considerable difficulty in acceding to these propositions under the circumstances of the case, but it was clear there was too much doubt on the point to advise a mortgagee to lend money on a title so circumstanced.

With respect to the admissibility of parol evidence, it is said<sup>h</sup>, that if there be no ambiguity on the face of the deed, extrinsic evidence cannot be admitted. This position, however, seems to require some explanation; for in the instance of a conveyance of the manor of S., there is not on the face of the instrument any ambiguity. But if it be found that there are two manors, the one of north S. and the other of south S., all the books agree, that evidence may be adduced to explain which manor is meant, though on the face of the deed there is not any apparent ambiguity.

The deed must be construed with relation to the subject of it, and the best way to expound a description of parcels is to read it on the land. This mode of construction does no violence to the rules respecting the admissibility of parol evidence, for it is perfectly competent to advert to the situation of the parcels to explain ambiguous words in an ill penned instrument, though evidence cannot be adduced to enlarge or contradict it<sup>i</sup>; and evidence shewing that the parcels were in the same situation as to boundaries, &c. at the date

of the deed as they are now, is not, it is apprehended, that sort of prohibited evidence which cannot be received; because it merely proves that there has not been any alteration in the parcels, and that the construction of the deed at this day, should, with reference to the subject matter of it, be the same as it was on the day it was executed. So contemporaneous evidence of what was the general import of a particular term at and about or prior to the period when the deed was signed, would it is conceived be admitted; for per Vaughan C. J. at the foot of *Sheppard v. Gosnold*, 'the meaning of things spoken or written must be as it has constantly been received by common acceptance'. But the rule to be collected from a numerous class of cases<sup>k</sup>, is, that if extrinsic circumstances create a doubt as to the operation of any particular word or set of words in a deed, then if there be a sufficient estate to satisfy the words of the instrument according to one meaning, evidence will not be admitted to shew that the grantor meant to use the description in a more extended sense.

The words 'more or less,' 'about,' 'thereabouts,' 'by estimation,' and the like, import an uncertain quantity, and mean a reasonable difference in proportion to the quantity expressed. Thus the description of a house in B. and ten acres of land there, *sive plus sive minus*, will not include thirty acres usually occupied with the house; for per Yelverton J. by the words *sive plus sive minus*, ought to be intended a reasonable quantity, more or less by a quarter of an acre, or two or three at the most; but if it be three acres less than ten, the lessee must be content with it; *quod Fenner and Crook Js. concesserunt*<sup>l</sup>.

This rule has been followed in modern times. Sir W. Grant on this subject observes, the effect of the words 'more or less,' added to the statement of the quantity, has never yet been absolutely fixed by decision, being considered sometimes as intending to cover only a small difference, the one way or the other,—sometimes as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it. In the instance before him the description was rendered still more loose by the addition of the words 'by estimation.' The estimated extent of ground frequently proved quite different from its contents by actual admeasurement. If a man were told that a piece of land was never measured, but that it was estimated to contain forty one acres, would that representation be falsified by showing, that when measured, it did not contain the specified quantity? The only contradiction to that proposition would be, that it had not been *estimated* to contain so much<sup>m</sup>.

In a late case, the vendor proposed to sell to the vendee a farm, containing by estimation 349 acres or thereabouts; and one question, independent of the title, was, what the word 'acre' in the agreement for sale meant. The defendant said he understood it to mean statute acres; the plaintiff alleged that he meant only customary acres, which according to the custom of the country did not contain much more than one half the quantity of an equal number of statute acres. The court was clearly of opinion, that 'acres' in the agreement, meant statute and not customary acres; and as to the stipulation in the contract, 'that the parties should not be answerable for any excess or deficiency in the quantity of the land, and

that the premises should be taken at the quantity before stated,' Lord Eldon said that he never could agree that such a clause (if there were nothing else in the case) would cover so large a deficiency in the number of acres as that alleged to exist in the case before him<sup>m</sup>.

On a sale of an estate, stated to contain 3,000 acres 'or thereabouts,' a deficiency of sixty, seventy, or even a hundred acres would not perhaps afford a case for compensation; but if the sale be by a specified particular, and each close is therein described by name and quantity, down to poles or perches, *that* destroys the effect of the word 'thereabouts' as applied to the whole quantity, and confines it to each particular parcel, in reference to the amount of which, the deficiency must then be estimated. The vendor having specifically described each piece of land, is bound to indentify and deduce a good title to the several closes which he has thus taken upon himself minutely to define—a reference to the gross amount is considered inadmissible on either side where the contract is by a specified particular.

If a purchaser be aware of the actual quantity, or there is good evidence to induce the belief that he was so<sup>n</sup>, (though his being tenant would not perhaps be alone sufficient for this purpose), or if he actually accept the conveyance as of one hundred acres, and it afterwards turns out that there are only sixty; in that case it was his own fault not to have discovered the deficiency before he paid his money, and he will therefore be bound by his conveyance<sup>o</sup>.

In conclusion, it is observable, that as to copyhold

tenements the ancient descriptions are so rigidly adhered to, that they will, upon the custom and usage, be held sufficient to pass a much larger quantity than that actually expressed, if there be no evidence to shew that the lands were ever described otherwise. Thus two hundred and nineteen acres have been held to pass by a description of sixty seven acres on the court Rolls <sup>p</sup>.

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6.---*Of Deeds executed by Attorney.*

As to deeds executed by attorney, it is not the practice to require any evidence of the actual execution, either of the deed or of the power of attorney, but simply that the author of the power was living at the time the deed was executed ; and if a deed executed by attorney be thirty years old, then *that* requisition even, is dispensed with, at the same time a certificate of the burial of the author of the power is a satisfactory document ; but a purchaser, it is apprehended, could not insist on the production of such a certificate at the vendor's expense, where possession has gone uniformly with the deed for thirty years ; nevertheless if he procures it himself, and it does not verify the presumption that the appointor was living at the time when the deed was executed, the purchaser may make that circumstance, so proved by himself, a formidable objection to the title, though the time may be passed when the deed is said to prove itself.

The power is undoubtedly a muniment of title, and should accompany the deed of which it authorises the execution, or be covenanted to be produced if it relates

to other property ; but if the deed so executed by attorney be thirty years old, and the power itself be lost or mislaid, that circumstance would not, I should think, form a valid objection to the title, unless some evidence be adduced impugning the power, or shewing incapacity in the donor or some similar defect ;—the presumption is in favour of a deed of that antiquity, and the *onus* lies on the objector to shew an actual imperfection.

A purchaser cannot be compelled to take a conveyance executed by attorney where the vendor is in the kingdom and his concurrence can be obtained, even if the agreement for purchase be entered into with the attorney, unless there be an express stipulation in the contract that the concurrence of the principal shall not be required. So at least, the practice is taken to be ; for it does not follow that by entering into a contract with an agent who is authorised to sell, and even to convey, but who perhaps may treat with several persons before he meets with an actual purchaser, the latter shall be deprived of an unobjectional conveyance from the principal, merely from his knowing that the vendor has given power to the agent to sell ; for the vendor may by a letter, still on the road, have countermanded the authority to convey, though he could not after an agreement executed countermand the authority to sell.

Lord Hardwicke says, there is no instance in the courts compelling a purchaser to take a conveyance by attorney ; the power may be revoked the next moment, and that revocation may be notified to the attorney without the purchaser's knowing it, and then the conveyance would be void, and the purchaser's only remedy

would be a suit in equity<sup>a</sup>. So in a late case, Sir John Leach, V. C. observed, that although at law a conveyance by power of attorney cannot be questioned, yet as it imposes a greater difficulty of proving the title on the purchaser, and may expose him to a question whether the power of attorney had not been revoked, a court of equity, where the vendor comes for its aid on a sale, will compel him, if it can be conveniently done, to execute the conveyance in person<sup>r</sup>.

So if A. contracts to sell an estate to B., and before the conveyance is executed, he departs for the continent, leaving a general power of attorney with C. to execute the conveyance to B. when the purchase is completed; B. may object to take a conveyance so executed,—he not having agreed to take any other than a conveyance from the principal. But if A. being abroad, either transmits to or leaves with C. a general power to sell and convey an estate, which B. purchases, treating with C. as attorney, and knowing that his principal is abroad, then on completion of the purchase, can B. object that the vendor does not execute in person? If the agreement for purchase be in the name of the principal, and the contract is, that *he* shall convey &c, the purchaser it is apprehended, may resist specific performance of his contract, unless he obtain the actual execution of the vendor to his conveyance, but he could not *compel* the vendor to execute in person; for he is out of the kingdom and not within the jurisdiction; and he has no remedy against the attorney, who himself commonly engages for nothing. The purchaser at the same time knew he was dealing with a person whose acts were open to this objection, and he must therefore either rescind his contract, or consent to take the conveyance as he did the



agreement, by attorney ; Or if he will have the vendor's signature, he must be at the expense of procuring it, by sending out a trust-worthy hand to attest the execution of the deed by him, though ordinarily the expense of executing the conveyance does not fall on the purchaser. In such case, the precaution should have been taken of inserting an express stipulation in the contract, that the vendor's signature should not be required, which, however, would perhaps have deterred many persons from buying the property.

Hence it appears how little service these general powers are for any other purpose than the management of the lands. A trustee for sale, having the legal estate and ample authority to give a valid receipt for the purchase money, is the only person qualified to take a property to market in the absence of the owner.

Lord Hardwicke in the case above alluded to, says that a purchaser may be put to many difficulties by taking a conveyance by a power of attorney, for the letter of attorney may be lost, yet the party is obliged to prove it and the execution of it\*. This I presume only means, in case the power, or the deed executed under it, or the title of the purchaser be subsequently drawn in question in court. If a deed ten or twenty years old executed by attorney occur in a title, the due execution of both the deed and the letter of attorney, is presumed by the Conveyancer, if they appear to be properly executed and attested, and the possession of the land, and of the deeds themselves have gone accordingly. The only point he requires proof of is, that the grantor was alive when the attorney set his hand and seal to the conveyance. This is proved by an affidavit that he is still alive,

or by a certificate of his burial. Beyond *that*, the presumption in so solemn a matter is, that *omnia rite et solemniter acta* ;—a presumption fortified by a late case<sup>t</sup>, where the forgery of a power of attorney was visited with the severest punishment the law can inflict. And therefore on a subsequent sale of the property, the difficulty of proving the grantor's existence at a given time is not very great, especially if the evidence produced on the former sale be preserved.

On a bill for specific performance against the purchaser, he must shew some certain objection to the title, whereon the Master may found his report that the title is bad or doubtful.—The Master does not require all the deeds abstracted to be proved or even produced before him, unless the order runs that the abstract be examined by him with the deeds, which is very unusual,—the abstract alone being the ordinary document proceeded upon in the Master's office, and if the deeds are ordered to be produced, the Master does not require them to be proved, the presumption being in favor of such solemn instruments, until the contrary is shewn. And therefore it lies with the purchaser to prove his allegation that a particular deed is infected with fraud, or that the grantor died or otherwise revoked the power prior to its execution by the attorney. Then the Master does not enquire whether this be so or no, but requires the vendor to furnish him with an answer to that objection, which, if he cannot do, the report passes that the title is objectionable. On exceptions to that report, an issue may be obtained to try the fact before a jury, but the formal proof of the execution of the documents themselves, is not usually gone into in passing a title, either in the Master's office or in the Conveyancers' chambers.

In an ejectment against a tenant holding over, the landlord puts in the lease, or shews an existing tenancy which has been regularly determined, either by notice to quit, or by expiration of the term ; upon this he will be entitled to recover, without proof of all the links in his title for the last thirty years. This excuse of proof arises from the privity which once existed between the lessor of the plaintiff and the defendant, and the principle that the tenant shall never gainsay the title of his landlord to whom he has paid rent, or whose right he has otherwise acknowledged. But if after the expiration of the term and before the entry of the landlord, or even during the existence of the lease, a stranger steps in, or the lessee himself disclaims the tenancy of the landlord and claims to hold adversely to him, then the landlord in bringing his ejectment, must prove his title, and the several deeds and documents composing it.

This he does by shewing, that either he himself or the person under whom he claims has been in actual possession or receipt of the rents and profits within twenty years preceding the date of the action brought. Having proved *that*, he next proceeds to prove all the intermediate deeds and conveyances and other acts of title from that time, in the usual way, but it is not, in this action necessary for him to prove a title anterior to that possession by production and proof of all the conveyances for the last thirty years. To prove the subsequent title, he makes profert of the conveyances from the last possessor to himself, and proves the due execution of these documents by the attesting witnesses.

If any of these deeds are executed by attorney, then as the letter of attorney is itself a recent deed, the lessor

must prove the due execution of that instrument also", which, if executed in this country, can be easily done by the *viva voce* testimony of one of the subscribing witnesses; but if it be executed abroad in presence of foreign witnesses, it will require authentication by a notary public, and an affidavit verifying the signature of the notary; though in Church's Case it was said, that the notarial certificate and seal, verified by the British Consul, were not sufficient proof of the execution of a power in America, without an affidavit by one of the attesting witnesses also". It must also be shewn that the grantor was living at the time his attorney executed the deed; for a presumption that he was living cannot be made in this case more than in any other.

Thus much it was necessary to remark, to shew the nature of the difficulties to which a purchaser is exposed in taking a conveyance by attorney. He will not on a future sale be put to much inconvenience or expense, if on his own purchase he insist on and preserve the proper evidence.

It has been recommended to take a covenant from the attorney that the power is not revoked, to remain in force till the deed be confirmed by the principal. No purchaser, unless obliged, would willingly take a conveyance from or pay his money to an attorney, however ample his power; but if he is obliged to do so, the above recommendation does not seem an improper precaution, if it can be obtained, but if the purchaser has placed himself in a situation in which he would be compelled to take a conveyance by attorney, the attorney would undoubtedly resist this requisition, and the purchaser as surely could not enforce it.

It should also be observed, that the execution of powers cannot be delegated to an attorney<sup>x</sup>. Persons having powers or authorities, such as powers to lease, or to sell, or to whom personal rights of consent or discretion are given, cannot, unless there is a special provision for this purpose, execute an effectual deed under such powers otherwise than in person<sup>y</sup>.

Powers of attorney are more frequently used in the completion of purchases of copyhold lands, than of freehold estates. The surrender however to a purchaser, which is in fact, the conveyance of copyholds, is seldom, if ever, made or accepted by attorney, but the admission of the purchaser, which is an act merely perfecting his conveyance, is often performed by attorney; and to this, there is little or no objection, as on a future sale, if he be allowed to surrender, *that* is a virtual admission, and so it is unnecessary to prove that he was alive when his attorney prayed for and obtained his admission. The principal point in these cases, is to see that the surrender, if made out of court before two tenants, or before a deputy steward, is duly presented and surrendered at the next court; this however, is not the subject of the present essay.

So seisin may be delivered and received on a feoffment by attorney, without any material objection to the conveyance, further than that the necessity it occasions of preserving and giving evidence of the existence of the parties at the time the powers were acted on.

That a power remains unrevoked till the contrary is shewn, is a necessary inference; and a court would not presume a revocation of a power if acted on within a

reasonable distance of time from its date, without some ground to induce such presumption ; the requisition as to the donor's existence, seems indeed to rest on such gratuitous assumption ; but as instances of the uncertainty of life are so abundant, it is not unfair to say, ' if you will prove that the donor was living on the day his attorney executed the conveyance, or delivered the seisin &c, I will pay you the purchase money on delivery of the deed, if by your power you have ample authority to receive it and to give me a complete indemnity and discharge.'

A conveyance then executed by attorney should properly be delivered as an escrow, to be handed to and accepted by the purchaser, on proof of the donor's existence at the time of execution. With this, it remains to be decided, whether a purchaser, aware originally that he was treating with an attorney and not with the principal, can resist specific performance of his contract for want of the principal's signature to his conveyance. The Bank of England does not usually require any evidence of the existence of the principal at the time the attorney demands to act on the power ; and it is presumed, a purchaser could not resist specific performance on the ground of another person conveying for an absent or incapacitated trustee, under the direction of the court by virtue of the late act<sup>z</sup>.

It may not be amiss to add in connection with this subject, that a power is revoked by death<sup>a</sup>; by the marriage of a feme<sup>b</sup>; by the principal's interfering with the matters deputed to the attorney<sup>c</sup>; by the principal's bankruptcy or insolvency<sup>d</sup>; as well as by actual revocation ; all of which are complete from the acts done without any communication to the attorney<sup>e</sup>; the in-

stant those acts are committed or executed, the power is at an end; and the power being altogether a voluntary instrument (except when given as a security for the payment of money), the court of chancery has no jurisdiction to prevent a revocation<sup>f</sup>; but the acts already done under the power for valuable consideration are binding on the principal<sup>g</sup>, as also are those *in fieri*; such for instance, as a contract for sale which the purchaser could have compelled the principal to have performed. But a power given to a creditor or mortgagee as a security, is irrevocable to the extent of the debt<sup>h</sup>.

An authority to execute a deed must be by deed<sup>i</sup>, and it will require a deed stamp<sup>j</sup>; but its revocation may be by parol<sup>k</sup>. On the execution of the deed the power should be given up to be annexed to or accompany the conveyance. If therefore the attorney has more to perform than the sale and conveyance of the particular estate sold, he should be furnished with two parts of the power, in order that on giving up one, he may retain the other himself, on which the purchaser should see endorsed a memorandum, that it has been executed in part by the sale to him. If this precaution has not been taken, he should require an attested copy of the power and a similar endorsement.

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7.---Of the Proof of Counterparts.

That a deed is a counterpart is discoverable in some degree by the stamp it bears. Deeds are not always endorsed counterparts when in fact they are so; and now the stamp laws require the same duty on counter-

parts as on originals<sup>1</sup>; but under the earlier stamp acts, a common deed stamp only was required on the former, if the latter were impressed with the proper *ad valorem* duty. It was then not uncommon for a purchaser to take a conveyance by lease and release and also by bargain and sale enrolled,—a course which has led to one direct fraud, within the writer's limited experience.

In the case alluded to, the estate was part of a larger one, and the title-deeds were retained by the owner of the larger portion of the lands. The purchaser being in want of money deposited the lease and release and a set of attested copies with his bankers, and afterwards executed a mortgage to them, as a security for his balance. At a subsequent period, he procured a second set of attested copies, and with them and the bargain and sale made out his title to the satisfaction of a second mortgagee, who lent his money quite unconscious of the first incumbrance. On paper, a fair abstract of title was deduced, and a good and valid conveyance set forth to the mortgagor by bargain and sale duly enrolled. The abstract, as is sometimes the case, had not been examined with the deeds prior to its perusal by counsel; so that no notice was taken of the stamp on the counterpart, which would in all probability have led to a knowledge of the original conveyance by lease and release. The interest becoming in arrear, and the mortgagor having taken up a permanent residence on the continent, resort was had to the remedy by ejectment, when the first mortgage was discovered, which was found to exceed, with principal and interest, the value of the property. The mortgagor was a titled person, and so palpable a fraud was never contemplated; but he was a total stranger to the second lender and



his solicitor ; and it afterwards appeared that the solicitor employed by him in this transaction was not his regular solicitor, but a stranger selected for the occasion. These circumstances are merely mentioned to shew the caution requisite in dealing with persons residing out of one's own neighbourhood.

But to return,—Counterparts or copies for the use of the party, are now required to be stamped with the same duty as the originals. The framers of the stamp act do not seem to have contemplated the probability of one party taking two copies for his own use to secure himself by enrolment against the loss or destruction of one. The words of the act evidently refer to 'either of the other parties than the principal' taking a copy and not to the principal himself taking two copies, though the words are general enough to embrace that case, as also the case where there are two or more grantees, and each takes a copy. To make that copy of any service in evidence, it should be stamped and executed as an original, it is then indeed an original document, and entitled to all the credence of the one first executed. So if the family or trustees of the gentleman, require a counterpart of the settlement, which is the property of the trustees of the lady, it must be executed and attested as an original, and not as heretofore on a common deed stamp. But counterparts of leases form an exception to this rule by express provision of the statute, and it has lately been decided, as to the degree of credit this counterpart is entitled to, that in an action between lessor and lessee, the counterpart being proved, it cannot be objected that the original is on an insufficient stamp<sup>m</sup>.

If a deed be marked as a counterpart, the Conveyancer requires the abstract to be examined with the original; or if it be alleged that the original is lost, then he calls for the same strict proof as a court would require to let in the secondary evidence of the counterpart. The suspicion of a *deposit* of the original, will be more or less intense, as the deed is of greater or less importance to the title, or is of antient or modern date, or as the circumstances of the borrower or seller appear by reputation more or less involved. To let in the evidence of a counterpart, it should be shewn that diligent search has been made for the original deed amongst the papers and repositories of the persons in whose custody the deeds now are or may have been, and this should be attested by an affidavit; or the more satisfactory evidence is, that the deed has been destroyed by fire, by damp, by vermin, or by some other casualty.

In a case just laid before the writer, it is stated that the parson's greyhound had made her nest in the chest containing the parish registers, and that, as the Rev. gentleman had a greater affection for the progeny of his companion than the offspring of his parishioners, the requisite registers of baptism, &c. had become obliterated and partially destroyed. In another instance, a tradesman quite unacquainted with the nature of parchment, invested his money, on retiring from business, in the purchase of land; the title to which being satisfactorily proved, the conveyance was executed, and the deeds handed over to him. He was told they were of importance and should be kept in a safe place. After due consideration, he considered the cellar as least accessible to fire, and having procured an iron chest, with treble locks, &c. consigned them to a remote corner of

his best wine bin, a spot only visited on high days and holidays. It occurred that during the winter months the cellar was overflowed, and the water entering at the key holes and crevices of the iron chest, had no such means of escape. In the following spring some occasion called for inspection of the deeds; when it appeared that these 'sinews of the land,' as Lord Coke calls them, had become so saturated with moisture that the writing was nearly obliterated; but to mend the matter, they were laid before a fire to dry; the consequence was, they became so scorched and crimp that they crumbled to pieces on the least attempt to open or fold them up.—A sad dilemma was thus involved; but evidence of these facts, supported by the affidavit of an uninterested person, would more satisfactorily let in the secondary evidence of copies and counterparts, than any allegation that the deeds were lost or mislaid; *that*, indeed, is an extremely suspicious averment *prima facie*, and requires great respectability of character, and full and convincing proof to entitle it to belief.

Lord Hardwicke on this subject says,—If an original deed be lost, the counterpart may be read, and if there be no counterpart forthcoming, then a copy may be admitted, and even if there should be no copy, parol evidence of the deed may be given, and of the manner of its loss, unless it happen to be destroyed by fire, or lost by robbery, or by any unforeseen or unavoidable accident; these are sufficient excuses themselves: but then the copy must not be inconsistent and variant from the title which is set up by the party who claims under the original deed, as it was in the case before him; for the limitations under the copy were different from those set out in the pleadings<sup>a</sup>.

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So Lord Holt held, in the 3d. of Queen Anne, that the counterpart of an antient deed which might be lost, was good evidence of the original with other circumstances, but not of itself without other circumstances; but a counterpart of a deed leading the uses of a fine was of itself good evidence; and he remembered a case in Lord Hale's time<sup>o</sup>, where the counterpart of an antient deed was admitted in evidence; and a special verdict being found, stating the original deed, it concluded '*prout* by the counterpart it did appear.' And this he said, was so done to preserve the precedent<sup>p</sup>. The circumstances here alluded to, are those respecting the loss of the original deed, without which, it is now pretty clear that the secondary evidence of the counterpart cannot be let in.

In Sir Wm. Pole's case, it was well said in argument, that to induce the court to read a counterpart, it should be shewn that the original is lost, or that it is in the adversary's hands; it should also appear that possession has gone according to the deed; if not, a very good account should be given why it has not accompanied the deed<sup>a</sup>. And this evidence respecting the loss of the original, the Conveyancer requires as well as the court; and the antiquity of the counterpart is immaterial in this case, though in court, if the counterpart produced be thirty years old, evidence of its execution would not be requisite.

But it should be observed, that where counterparts are executed, and each party has the custody of a copy, one party cannot compel inspection of the other's part if he has lost his own. Thus, where two parts of a deed of charter-party had been executed, and

one part had been lost, the court of Common Pleas refused to compel the charterer to grant inspection and a copy of the other part<sup>1</sup>. So where two parts of a lease were interchangeably executed, and the part in the keeping of the plaintiff was lost, the court would not interfere to compel the defendant to permit the plaintiff to inspect and take a copy of that part which was in his possession<sup>2</sup>.

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#### SECTION IV.

##### *Of the proof of Particular kinds of Deeds.*

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| 1. <i>Feoffment.</i>                | 8. <i>Lease and Release.</i>               |
| 2. <i>Bargain and sale.</i>         | 9. <i>Appointment.</i>                     |
| 3. <i>Covenant to stand seised.</i> | 10. <i>Deeds to lead and declare uses.</i> |
| 4. <i>Gift.</i>                     | 11. <i>Fine.</i>                           |
| 5. <i>Grant.</i>                    | 12. <i>Recovery.</i>                       |
| 6. <i>Exchange.</i>                 | 13. <i>Private and Local Acts.</i>         |
| 7. <i>Partition.</i>                | 14. <i>Inclosure.</i>                      |
|                                     | 15. <i>Settlement.</i>                     |

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##### 1.---*Feoffment.*

On a feoffment it is necessary to observe that livery of seisin is endorsed. The actual endorsement is seldom if ever abstracted, though as the virtue of the conveyance is derived entirely from the regular performance of this ceremony, a literal copy of the memorandum would not be misplaced in a properly prepared abstract. The court, on proof of the execution of the deed, presumes that the endorsement as to the livery of seisin is correct, if possession has gone accordingly and is consistent with the deed; but if possession has not gone with the provisions of the deed, livery must be proved<sup>3</sup>. The

Conveyancer makes a similar presumption, and if it be stated in the abstract that livery of seisin is endorsed, he takes for granted that it was properly performed. If the lands lie in different counties, it may be proper to inquire, if livery was given in each county, as without a separate delivery for each county, the feoffment would on the face of it, be informal and defective<sup>u</sup>, unless it be of a manor which lies within two counties, and then it seems, livery in one county will suffice for both<sup>v</sup>, and as the lands over which the manor extends, will pass by the word 'manor' in a deed<sup>w</sup>, livery of seisin of the manor as a corporeal thing, should pass all the lands in both counties; but a Law-writer of great and deserved repute, entertains some doubt on this inference<sup>x</sup>.

A feoffment sometimes appears to be made by deed poll. This anomaly often puzzles the novice; he will however find, that a feoffment in the name of the grantor only, will be as available as one made by both parties, if livery of seisin be properly performed upon it<sup>y</sup>.

If it turn out that seisin was not duly delivered on the feoffment, then the grantee may allege, that the deed operated as a release, and by proving the lands to have been in the occupation of a tenant at the time the feoffment was made (even if the occupier be only tenant from year to year), *that* will be sufficient to support the deed as a release of the reversion, which lies in grant and not in livery<sup>z</sup>. But a tenancy at will would not support a release, as the grant would be a determination of the will; nor would an *interesse termini*, as there, the party has no estate, but only an *interest* till

entry<sup>a</sup>. If the lands were not in the occupation of a tenant, the feoffment may still be supported as a covenant to stand seised, if there were any relationship between the grantor and grantee or their wives ; although such relationship be not stated in the deed, nor any reference be made to ' other considerations,' and although as it should seem, a money consideration be apparent as part of the motive for its confection. This subject has lately been mooted in a case which came before the King's bench in Ireland<sup>b</sup> ; that case, however, does not go quite the length of the foregoing propositions, but it will be found, it is believed, that the courts will strain every point to support, rather than destroy, the obvious intention of a solemn assurance<sup>c</sup>. And the courts have, after a period of twenty years quiet possession, presumed livery, where there is nothing to rebut that presumption, but when there is an informal or an insufficient delivery of seisin, there, a presumption that livery was correctly made, cannot arise in the face of an absolute imperfection.

Upon proper and direct evidence of these facts, Conveyancers have little hesitation in accepting titles thus circumstanced, if possession has gone accordingly, and the title deeds are forthcoming. And it is apprehended that a purchaser could not object to a title because a particular deed does not operate in the exact technical mode intended, if it has legal effect in some other unobjectionable way. It should however be remembered, that deeds resting on this latter kind of construction, are in the nature of voluntary conveyances, and if of recent date are exposed to cavil by creditors and subsequent purchasers, if any ; but if possession be

delivered to the purchaser, and the grantor has been dead some time, little risk will be encountered from a blemish of this sort.

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2.---*Bargain and Sale.*

This description of assurance is not very common in abstracts. In making a tenant to the præcipe for suffering a recovery of property about to be sold in lots, it is frequently recommended to convey the freehold to the tenant by bargain and sale, in order that by enrolment, the whole assurance may be on record, and the expense thereby saved of giving attested copies of a voluminous deed to the purchasers of the different lots; but even then the holder of the deed and of the exemplification of the recovery, must enter into a covenant for production of them; for though they are of record, the bargain and sale itself, and the exemplification under seal, are the best and first evidence of these assurances; and it is observable, that by the common law, any deed may be enrolled for safe custody<sup>d</sup>; so that a tenant to the præcipe need not necessarily be made by bargain and sale to procure the advantage of enrolment; any other assurance will do as well; consequently the risk of non-enrolment within due time (a risk very considerable in large offices amid the pressure of business) need not be sustained; but whether a deed thus voluntarily enrolled could be called a document of record, may be questioned: I should think it would.

It is said by Gilbert, C. B.<sup>e</sup> that an enrolment of a deed is not a record, because it is not the act of the court, but only a private act of the party authenticated



by the court. This observation is addressed to the strict legal meaning of a record, which Conveyancers disregard, and they for distinction sake, call all deeds of record which are enrolled in any court of record : and of these, purchasers according to the usual and common practice are denied attested copies, inasmuch as they can, by appealing to the enrolment, obtain the more direct evidence of an original and legally authenticated copy, which by a curious perversion is esteemed in court of greater value than the original ; for the copy produced in evidence must be proved to have been examined with the enrolment, not with the original. The observations of the learned Chief Baron, if admitted in the force of a first impression, apply as well to deeds which require enrolment by law as to deeds voluntarily enrolled, and of the former it is clear a purchaser is not entitled to attested copies<sup>f</sup>.

In an abstract of a bargain and sale, the proper precautions are, to see that it is founded on a money consideration<sup>g</sup> ; that no use is limited on the seisin of the bargainee but such as is intended to be a trust<sup>h</sup> ; and that the deed itself has been duly enrolled within six lunar months of its date<sup>i</sup>. That the bargain and sale is indented, and that the enrolment is on parchment (two express requisitions by the statute), are presumed until the contrary appears ; nor can the endorsement of enrolment be averred against, though written on an erasure<sup>j</sup> ; but it is a high misprison in an officer to alter the enrolment without the sanction of the court. Nevertheless, it has been decided under the annuity act, that if a correct memorial be incorrectly enrolled, and after some years the officer of the enrolment office discovers and rectifies the error, before any proceedings are

commenced to vacate the annuity, the court finding the enrolment right when they call for it, will not enquire *when* the entry was made <sup>k</sup>. A deed of bargain and sale enrolled under the statute 27 H. 8 c. 16, has been rightly enrolled as of the day when it was brought into the enrolment office, although delivered to a porter in attendance there after office hours, and not minuted by the clerk or in fact received by him, till two days afterwards<sup>l</sup>.

A bargain and sale not duly enrolled may nevertheless operate as a grant, if the occupation of the land be in a tenant and a pecuniary consideration is stated or actually has been paid <sup>m</sup>; the deed though unenrolled, is evidence of a binding contract in equity, for the statute does not declare it absolutely void <sup>n</sup>.

The Conveyancer however never accepts a title as marketable without the legal estate; and he leaves to the vendor the expense of repairing a defect arising from any want of enrolment, by procuring from the bargainor or his his heir, a conveyance of the legal estate, or compelling such conveyance, if need be, by suit in chancery. Nevertheless the purchaser is not bound to wait till the determination of the suit, if he be not so inclined; and he may declare off his contract if the bargainor refuses to join in the conveyance.

At law, the endorsement of enrolment on a bargain and sale, is considered sufficient evidence of the due execution of the deed without further proof<sup>o</sup>; for the law requiring enrolment, and the authentication of the deed being entrusted to a proper officer, (who, though not expressly required by the statute, does always insist on the attendance of one of the parties to ac-

knowledge it before him), it is supposed he would not wilfully affix his signature to a counterfeit instrument; but this presumption is made only as against the parties; and where a deed, purporting to be the deed of several, is enrolled on the acknowledgment of one alone, (and this is sometimes done upon the acknowledgment of a mere nominal party, whose name is introduced for the very purpose); it would be manifestly inconsistent with the plainest principles of justice to admit such enrolments to be evidence against those who have not acknowledged the deed, without proof of their execution of it; as for instance, to receive a deed acknowledged by a bare trustee, without proof of execution by the owner of the inheritance<sup>p</sup>. Accordingly we find it ruled, that such a deed declaring the uses of a fine must be duly proved<sup>q</sup>.

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3.---*Covenant to stand seised.*

This is a very unusual document at the present day; and even sixty years ago it was seldom resorted to; so that its occurrence in abstracts is not very common now. This species of assurance is purely voluntary, and must be founded on the consideration of blood or marriage, as a bargain and sale is on money or money's worth. Most deeds will operate in this way, if made between relations, although other considerations are expressed, and no other consideration is referred to; but it is not settled what degree of relationship is sufficient to substantiate the consideration. It certainly is not that near propinquity which raises a moral obligation to provide for and maintain the object; for there is no such obligation on one man to support his brother,

nor could the parish compel a brother to maintain all or any of his pauper fraternity, yet the consideration of brotherly affection will support a covenant to stand seised. Perhaps the scale of relationship may be held to extend to the third degree and embrace second cousins ; but it may be doubted whether it would hold as to third cousins, *who* may intermarry.

The Conveyancer never requires actual proof of the consideration mentioned in the deed ; and therefore if a relationship be expressed, a purchaser cannot, I take it, insist on actual proof of the fact ; but if the relationship be not expressed, then, I apprehend, a purchaser may and should require actual proof of the consanguinity or relationship by marriage, if it be averred.

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4.---*Gift.*

A gift also is a voluntary conveyance<sup>r</sup> ; and if it be of late date, it is proper to enquire, whether the grantor was indebted at the time ; if it be answered, he was not indebted, the purchaser, it is conceived, must rest satisfied with that negative reply, unless he can shew that the grantor *was* and still continues indebted ; for these deeds are not absolutely void, but only voidable as against creditors and subsequent purchasers for value.

It may also be proper to search for judgments against such a vendor ; and as a voluntary conveyance may be defeated by a subsequent conveyance for value made by the grantor himself during his lifetime<sup>s</sup>, a title depending on such an instrument cannot be safely accepted until after his death, and therefore it is proper to enquire

whether the grantor is dead or alive; if dead, a certificate of his burial should be called for; and this certificate could, I should think, be insisted on. A certificate of the burial may also be necessary to shew the age of the party, which all modern registers do. If the grantor were at an advanced age when he executed the deed, it may be proper to enquire if he was of sound mind, and clearly capable of making the gift<sup>t</sup>. Voluntary conveyances by traders are very exceptionable documents, and require rigid investigation, particularly if of recent date<sup>u</sup>. A deed of gift, not to take effect till the grantor's death, is clearly testamentary; as is also a deed to the use of himself for life with a power of revocation<sup>v</sup>.

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5.---*Grant.*

The term 'grant' is used to express the operative part of all deeds, as well as to designate one particular kind of conveyance. Thus a feoffment, fine, recovery, lease and release, bargain and sale, covenant to stand seised, and even a lease, are all said to operate by grant; but the simple grant at common law is complete without any of the ceremonies peculiar to those species of assurance. It does not require enrolment, nor a prior lease for a year, nor the consideration necessary to establish a covenant to stand seised to uses. Livery of seisin is altogether incompatible with it, and it is not a matter of record. Reversions and incorporeal hereditaments lie in grant, and it is to this description of property only that assurances of this kind expressly apply. The evidence respecting its execution is not peculiar, but like that on other deeds, is presumed until the contrary is shewn.

The operative and effective part in this description of assurance, is the word 'grant,' which it has been thought, of itself creates a warranty. In consequence of that opinion, trustees are usually advised not to convey by a deed which contains the word 'grant,' for fear of warranting what they have no interest in; but it is now agreed, that this word, when used in a conveyance of an estate of inheritance, does not imply a warranty. Lord Coke distinctly observes, that the word 'grant' does not create a warranty<sup>w</sup>; and it is difficult to conceive how a contrary opinion could prevail. Trustees are also now generally further protected by the words 'by way of release or other assurance only and not of covenant or warranty,' usually introduced before the grant by them.

Lord Coke also says, that the words 'gift and grant' may amount to a feoffment, a lease and release, a confirmation, a surrender, &c. and it is in the election of the party to use them to which of these purposes he will;—but that a release, confirmation, or surrender, &c. cannot amount to a grant, &c. nor can a surrender amount to a confirmation, or a release, &c. because these are proper and peculiar conveyances, destined to a special end<sup>x</sup>; nevertheless the words 'limit and appoint,' have been held to amount to a grant<sup>y</sup>.

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6.---*Exchange.*

Under an exchange at common law, perfected by actual entry, Conveyancers usually require not only the title to the lands taken in exchange, but also the title to the lands given in exchange. They do not appear to

be furnished with any decided case, authorising them to insist on this double requisition; and, neither in Coke upon Littleton, nor in Sheppard's Touchstone is the point distinctly noticed\*. The implied warranty is certainly an objectionable feature in an exchange; for if the title of either party be defective, the other may on eviction re-enter on his own land, though it may have since been sold and conveyed away to a *bona fide* purchaser for valuable consideration; whose only remedy would be an action for damages to the amount of the loss he may have sustained, or a tedious and expensive process of law on a trial of right to recover back the lands given by his vendor in exchange.

A title so circumstanced cannot be pronounced marketable; but the question is whether the *onus* is not thrown on the purchaser, to shew some defect in the title to the lands given in exchange, before he can successfully resist specific performance of his contract for the purchase of the lands taken in exchange. That question has not been mooted in court: it involves the enquiry incidentally, how far the vendor can insist on the production of the deeds of the other party to the exchange for the avowed purpose of enabling the purchaser and his legal advisers to discover a flaw in that title: then if any defect appear, does it belong to the vendor to repair the title to another person's estate?

Unless there were covenants in the deed of exchange to produce the title deeds, it would not be prudent for the person who has the lands given in exchange, nor can he, it is submitted, be compelled to suffer his deeds to be inspected, in order to discover a defect in them to his own prejudice; it might expose him to a bill in

equity for a discovery, a consequent action of ejectment, and ultimately perhaps to the loss of his estate, even after spending a large sum of money in improvements<sup>a</sup>. It therefore behoves persons making exchanges, to reserve abstracts and attested copies of the title to the lands given in exchange, as also a covenant to produce the original deeds as occasion shall require; that covenant however, would not bind the lands in the hands of a sub-purchaser; and the general right to inspect another person's title deeds which do not relate specifically to the property of the party making that requisition, is a point that remains to be decided.

From the tenor of these remarks, it is obvious, that any mode of escaping from the inconvenience attendant on a common law exchange should be adopted. This may be done by mutual conveyances taking effect under the statute of uses, and by that means also the necessity of a formal entry will be obviated. It is best, I think, to comprise both conveyances in one deed: making two parts, both original. The consideration is then manifest on the face of the instruments, and the covenants being qualified, each party takes upon himself the risk of the other's title; which it is assumed he has previously inspected; there will consequently be no occasion for a covenant to produce deeds, if the titles relate exclusively to the lands in exchange; but if they relate to other lands also, then a covenant by the party retaining the deeds to produce them, will be essential.

As to exchanges under inclosure acts, it seems admitted that a *re-allotment* of the land carries with it no change in the *title* of the owners, the local act gene-



rally declaring that the allotments shall be subject to the same uses, &c. as the lands in respect of which they are awarded. This is very clear and incontrovertible when the act authorises allotments in exchange, but when the local act does not contain this clause, a doubt may be entertained whether the same reasoning applies.

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*7.---Partition.*

The same warranty is implied on a partition between coparceners as on an exchange. If either party be evicted of his share by title paramount, he may insist on a re-division, and claim an equal share in the remainder of the property not recovered by such paramount claimant<sup>b</sup>. This of course, can only apply where there are different estates held under different titles; if the subject of partition be held under one title, then if the superior claimant selects one party, and in favour spares the other, can the dispossessed individual recover a moiety of the grace and favour bestowed on his companion? This however, is beside the subject of the present essay. The real question is, whether in a title derived through a partition, the purchaser has a right to require clear proof of a marketable title in the other allotments? If any of the original parties to the partition still retain their shares, then it is said to be proper to investigate the title to those shares; for as to them, the implied warranty continues; but as to such of the parties as have aliened in fee, this precaution it is thought, may be safely dispensed with; for that the privity of estate is destroyed by that alienation, in which event, says Lord Coke, the remedies under the warranty are gone<sup>c</sup>.

This warranty does not arise on a partition between joint-tenants and tenants in common ; for their estates being created by act of the party, partition was not compulsory between them at common law<sup>d</sup> ; but as between coparceners, whose estates are created by act of law, partition was always compulsory ; and as the rule is, that the act of law shall injure no one, coparceners were not to be in a worse condition by the partition than they were before, and therefore after partition they were allowed the same remedy and privity between themselves as if they enjoyed the land in coparcenary. Hence arises the difference on partition between coparceners and joint-tenants or tenants in common. On partitions between the latter, the title to the different purporties is never required ; and when coparceners have by sale, reduced themselves to tenants in common, the warranty on their partition is said to cease ; but when the coparcenary continues, a requisition of the other titles is sometimes made, though I believe seldom, if ever conceded ; from the difficulties perhaps just alluded to in the section on exchanges.

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8.---*Lease and Release.*

There is nothing peculiar in the evidence required to support the abstract of this species of assurance. The lease for a year is sometimes stated to be lost, but after a lapse of twenty years, that circumstance will not form an insuperable objection to the title ;—the existence of the lease at the time will be presumed<sup>e</sup>, and if the parcels are stated to be in the occupation of a tenant, *that* is enough *prima facie* to shew that the deed has legal operation as a grant<sup>f</sup>. In Ireland the lease is never

made, the recital of it in the release is considered sufficient evidence of its existence<sup>c</sup>. But if the assurance be of less antiquity than that alluded to, the want of a lease for a year, cannot, it is presumed, be inferred from the recital of it in an English release; for that recital is conclusive only against parties and privies to the deed containing it and their representatives; as to others (including issue in tail, remainder-men, and reversioners<sup>h</sup>, and not improbably creditors by specialty), the recital, except as evidence, is wholly inoperative; and as evidence, it is but of little value unless corroborated by circumstances.

It has been observed that an *interesse termini* will not support a release, how then, it may be asked, does the lease for a year, upon which an entry is never made, support the release? The answer is, that that part of the assurance which is commonly called 'a lease for a year,' is not in fact a lease but a 'bargain and sale,' which does not by the statute require enrolment, and the statute of uses transfers the legal estate to the bargainee without actual entry,—the words commonly used, 'bargain and sell,' and the intent of the parties being, that it shall operate under the statute of uses and not at common law. In common husbandry leases the reverse is the case; it is obvious from the words used and the whole tenor of the instrument, that a lease at common law is intended, and not a bargain and sale; for although the words 'demise, lease, and to farm, let,' would, if necessary, operate as a bargain and sale, yet the rule is, that when a conveyance may take effect, either at common law or under the statute of uses, it shall operate at common law, unless the intention of the parties appear to the contrary; therefore if it be in-

tended that a term of years should be created by bargain and sale, the words 'bargain and sell' only should be used<sup>1</sup>.

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9.---*Appointment.*

It is essential, on perusing a deed exercising a power, to revert to the deed creating the power, in order to observe distinctly and indubitably, that the forms and ceremonies thereby required have been strictly attended to. The attestation of deeds exercising powers, should be set forth in the very words in which they are couched; but this is seldom done,—the scribe contenting himself with the usual phraseology, 'duly executed and attested,' without taking the trouble to refer to the authority to see that its requisitions have been 'duly' complied with.

In some instruments the exercise of the power and the granting and releasing part of the deed are found united in one sentence. This is untechnical, because the habendum following in the usual course, to A. B. his heirs and assigns, it becomes a question, when uses are surmounted on that seisin, whether they are uses, or whether they are trusts. The consequence is, that if in such a conveyance, common uses to bar dower are added, they become entirely nugatory; for the first use vesting in A. by the appointment, the intended uses to bar dower are mere trusts, and being limited to the same person who has already the legal and beneficial ownership, they are merged and drowned in that all-comprehensive estate, and the same party stands seised at one and the same time of the immediate legal and equitable

ownership in the same right : his wife consequently is entitled to dower. In a late case where this question occurred, the words of grant preceded those of appointment, and it was certified, both by the courts of Common Pleas and King's bench, that the legal estate did not vest and stop in the releasee, but passed on to the subsequent limitation of the uses ; consequently the legal estate was not outstanding in the releasee, as the master had reported<sup>1</sup>.

The disposition of the court of King's bench was to marshal the operation of the words, so as to make the words of release apply specifically to the habendum, and the words of appointment, ' to the uses hereinafter mentioned,' by which means, the limitation to the releasee was avoided, in reading the deed as to the power. But Bayley J. went upon the precedence of the words, namely, that the granting part coming first had prevented the exercise of the power, so that it was a mere conveyance to uses ; and in that view, this case would inferentially amount to an authority, for the vesting of the use in the releasee where the words of appointment, as they commonly do, precede those of release. It is however probable that the words will be marshalled to answer the obvious intention of the parties in which ever way they may be accidentally placed. Nevertheless the Conveyancer must, when the words of appointment precede those of release, take the objection, till the contrary is decided, either that the legal estate is outstanding in the releasee, or that the wife is entitled to dower ; at the same time the probabilities are, if the objection should ever come on for trial, that it will be ultimately overruled. In cases where brevity is an object, a short declaration may be added to this

blended mode of conveyance, stating that the appointment shall apply to the uses, and the release to the seisin.

The points to be attended to in the abstract of an appointment are, to observe that there is a clear reference to the power; that the appointment is not to one person to the use of another; that the donee is an object of the power; and that the ceremonies required by the power have been complied with. Beyond that, the evidence required by the Conveyancer in support of an appointment does not extend; the presumption is in favour of the credibility of the witnesses, and of the truth of the attestation, until the contrary is shewn.

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10.---*Deeds to lead and declare uses of Fines and Recoveries.*

These, as the terms import, are subsidiary or secondary assurances only, and are of no avail unless confirmed by the more solemn acts to which they relate. It is a rule of law to consider the deed declaring the use and the instrument raising it, as one and the same assurance, and if the principal or original part of the assurance, being a matter of record, prove itself, it should follow that the secondary or subsidiary part should likewise need no further formal verification; for it is quite evident that the parties meant to convey the lands to *some* uses, and the strong presumption is, that the declaration to which their signatures are attached, referring to the document of record, is not a counterfeit declaration,—no other appearing and the two assurances tallying in point of date, parties, parcels, and time. In *Glasscock v. Warren*<sup>k</sup>, this pre-

sumption seems to have been acted on; but in a subsequent case, all the Judges were of opinion that deeds declaring uses must be proved in the usual way<sup>1</sup>.

This actual proof, however, the Conveyancer does not require. He looks to see if the recovery is suffered or fine levied of the term it is alleged or agreed to be; that the parties and parcels correspond; and that there is such a connection in point of time between the several parts of this compound assurance as to preclude the probability of the one not relating to the other: seeing this, he concludes that the declaration is the act and deed of the party whose signature it purports to bear.

When this species of assurance is executed by a married woman, the acknowledgment of the fine or recovery gives validity to her signature of the appointment of the use; for the declaration being considered as part of the fine or recovery, it is in effect a matter of record; by which species of assurance only, can a married woman pass any estate or interest in real property not settled to her separate use or appointment, or which is not clearly converted into personalty by a trust for sale. It is however worthy of notice, that if a woman join in a fine merely to bar dower, her signature of the deed leading or declaring the use is not material, as the dower is extinguished by the fine or recovery in which she joins.

When a fine is covenanted to be levied to certain uses, it is competent to the parties before it is actually levied, to vary the uses, but then all parties must join in the second declaration, and that instrument must be of as high a nature as the first; and the fine also should

be levied to the same conusee, but this is not absolutely necessary ; and therefore where a fine covenanted to be levied to certain uses, was omitted to be levied, and several years afterwards (seventeen), a fine was levied by the same conusors, pursuant to a deed declaring other uses, and to a different conusee ; it was held that the fine operated to the uses of the latter deed, and not to the uses of the former <sup>m</sup>.

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11.---*Fine.*

*At law* the chirograph of the fine is alone evidence of its acknowledgment ; for an officer being appointed to give out an authenticated copy, that copy will be presumed correct, till the contrary is shewn. Nevertheless an endorsement on the fine by the same officer, that the proclamations have been duly made, is not received in court as evidence of the fact ; because, though the chirographer is authorised to make copies of the agreement filed of record for the use of the parties, yet the statute which gives him that authority, does not appoint him to copy the proclamations. To prove them, an examined copy must be produced and proved by the oath of the examining party, as in other cases <sup>n</sup>.

The evidence of a record is of so high a nature, that its authority is never permitted to be questioned ; and therefore when a chirograph of a fine is recorded, no averment can be made of an error in the caption or time of its acknowledgment, but it must be considered as a fine of that term in which it is recorded <sup>o</sup>. However, where there is a latent ambiguity, an averment is per-



mitted to explain that, though not to contradict the fine<sup>r</sup>. The record of the fine which remains in the possession of the chirographer, is the principal record ; so that if there be any difference between that and the record which remains with the *custos brevium*, the record in the chirographer's office is considered the true and correct one<sup>q</sup>. And it seems that a fine may at any time be exemplified under the seal of the court, which exemplification is of higher authority than a sworn copy ; and like the indentures, does not require any other proof. But the more usual substitute for the indentures, is a copy examined with the roll, which being proved by the examiner's oath, is good evidence<sup>r</sup>.

The Conveyancer usually takes for granted that the indentures of fine which accompany the deeds are true and legitimate copies of the record ; that the proclamations endorsed thereon were made pursuant to the statute ; and though no signature is attached to the indentures, he presumes that the document regularly issued from the chirographer's office. His object is to see that the fine tallies with the deed leading or declaring the uses, and that the parcels are sufficient to comprise the property conveyed ; also that the proclamations have been duly made, if there is any supposed latent outstanding right or interest in a stranger upon which the fine may or is intended to operate by non-claim. That the freehold is in one of the parties to the fine will appear by the previous title.

If proclamations are endorsed and possession has gone according to the fine, the Conveyancer usually rests satisfied with that endorsement, without requiring

the proclamations to be further verified ; and it is believed that a purchaser could not insist on a certificate from the chirographer's office, testifying the due entry of proclamations on the roll, where there is an unsuspecting endorsement of them on the indentures ; but where no proclamations appear on the indentures, then if the safety of the title requires the aid of non-claim, the purchaser may call for such a certificate at the vendor's expense. Formerly, fines were sometimes permitted to pass without proclamations, but now that is never allowed ; and therefore, if no proclamations appear, the presumption is that they were never made, but if the proclamations are endorsed, the presumption is the other way, and the *onus* of proving the contrary is thrown on the purchaser.

In *Doe v. Black*, a fine was levied in 1768, upon which the usual proclamations were endorsed. This fine was tendered in evidence in 1814, but no other evidence was given of the proclamations having been made than what appeared on the indentures themselves ; this evidence was objected to by the plaintiff's counsel, as insufficient to prove the fact of such proclamations having been made ; and per Gibbs C. J. The proclamations not being proved, there is no ground for a bar by the five years non-claim \*. This decision is in accordance with the rule at law previously noticed, but a purchaser it is presumed, could not insist on the evidence required by the court ; at least it is not the usual practice for him to require such evidence, but only to inquire if proclamations have been made ; to which, production of the indentures with proclamations endorsed, is in practice, considered a complete and satisfactory answer. And if it be true that fines are now never suffered to

pass without proclamations being made thereon according to the statute, the presumption, even in court, should be, that the proclamations have been duly made if they appear so to be. I can find no order enforcing this rule; such an order would certainly render the presumption much stronger on fines levied thereafter; but the loaded file of proclaimed fines hanging in the court of Common Pleas from term to term, is evidence that some regulation has been made on the subject, though no general order may be recorded.

If the parcels are insufficient, the vendor must at his own expense procure an amendment of the fine, which can be done after the lapse of many years, if the deeds leading or declaring the uses of the fine contain a full description of the property, as they generally and always should be made to do. The parcels in the fine are usually stated in round numbers, and it is only by carefully comparing them with the description in the deed leading or declaring the uses, that any certainty can be attained on this point. If for instance there are 100 acres of land altogether, and the parcels in the fine are described as, '60 acres of land, 20 acres of meadow, and 20 acres of pasture,' and upon looking to the deed, only 10 acres of grass land appear, the presumption is, that the residue, viz. 90 acres are arable, which would not pass under the description of 60 acres of land; but parol evidence may be adduced to shew that at the time the fine was levied, 30 acres were used as meadow or pasture. The object is to see that the number of acres of land mentioned in the fine will cover the arable lands, for as to the pasture, if it turn out that there is enough land described, that will suffice; as in the above instance, if there were 90 acres of grass land and only 10 acres of

arable, the description of 60 acres of land would be sufficient to pass the 50 acres of grass land not specifically described <sup>t</sup>.

If a fine be levied of houses, land, meadow and pasture; the word 'land' will not pass more houses than are actually named; though the word 'land' alone would have passed all the houses if there had been no enumeration of them <sup>u</sup>. But if a person has twenty messuages, and levies a fine of ten of them, parol evidence is admissible to shew which ten were intended to be conveyed <sup>v</sup>.

Another object is to see that all the parishes are named. Nothing but an amendment can rectify an error in this respect. So if woodlands or tithes are mentioned in the deeds and none appear in the fine, an amendment is the only method of curing this defect, provided the deed will warrant it, otherwise a new fine must be levied or the title be pronounced defective.

A fine is considered perfect when it has passed the King's Silver office <sup>w</sup>. That office, therefore, is the proper place to search for fines, if any suspicion occurs that a particular fine has not been levied, or none appears on the abstract or with the deeds, pursuant to a covenant for levying a fine. Search may also be made for fines at the chirographer's office, where the names, counties, and places are entered; but the books there go no farther back than the reign of George the third. The fines from the reign of Richard the first to the end of George the second are in the Chapter House, Westminster, regularly arranged according to the year, term, and county; in the earlier reigns the boundaries of the lands are frequently given <sup>x</sup>.

If a fine is covenanted to be levied in any of the deeds abstracted, and the indentures do not accompany the title deeds, the purchaser may it is apprehended, insist on the king's silver office being searched at the vendor's expense, to see if the fine has been levied ; he is not bound to rest satisfied with the mere negation that no fine has been levied. If it turn out that a fine has not been levied pursuant to the covenant, then it is for him and his legal adviser to consider what effect that omission has on the title. If indentures of fine appear, the purchaser cannot insist on those indentures being verified by reference to the king's silver office, at the vendor's expense ; for *prima facie* the chirograph is evidence of the fine, even in court, and *a fortiori*, it must be so to a purchaser out of court.

But a case has occurred within the writer's experience, where a country practitioner, some forty years ago, prepared indentures of fine exactly similar to those issued by the chirographer (a thing very easy to be done before stamps were imposed), and pocketed the whole expense of levying the fine (some 12 or £15) except what he was obliged to incur in taking the acknowledgment. In another case, a fine was duly acknowledged by a gentleman and his wife in the country, and sent by the country solicitor to his town agent to pass through the offices. Many years after, it was discovered that the agent instead of passing the fine in the regular way, retained it in his office, whether from negligence or design never distinctly appeared, but the inference was against the honesty of the transaction when it was found, that all the charges for passing the fine were included in his country correspondent's annual account.

It is needless to add, that the parties in both these cases were placed in situations of great difficulty ; but in the latter case it happened that one of the Commissioner's who took the acknowledgment was living and distinctly recollected the separate examination of the lady as to her intention to levy the fine; upon which the court of Common Pleas permitted the fine to pass, though near thirty years had elapsed since the caption, and both the lady and gentleman who acknowledged the fine were dead<sup>2</sup>. Of the former case, the writer lost sight after writing his opinion, but his impression is, that the parties were living and cured the defect by levying another fine pursuant to the covenant.

The purchaser, when a fine is the essential part of his conveyance, should see that it has passed the king's silver office before he pays his money ; but the extract, which he procures from this, or any other office in proof of the due levying of the fine, cannot be given in evidence ; for it is a rule that the *whole* of a record must be exhibited and not a part of it<sup>3</sup>.

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12.---*Recovery.*

The exemplification is the first and best evidence of the recovery, both to the court and Conveyancer ; if the exemplification be lost or mislaid, a copy examined with the roll, proved by the person examining it, is admissible in court ; but the Conveyancer usually rests satisfied, in that case, with an extract from the king's silver office. After twenty years the recovery deed is made evidence of the recovery, by an act of parliament presently mentioned.

In general, where a party suffering a recovery had power to suffer it, it is presumed that all things were regularly done to perfect the recovery, until the contrary appears. Where therefore the question was as to the validity of two recoveries suffered upwards of twenty years ago, the court held, that although after such a lapse of time, proper tenants to the præcipe would be presumed where no deeds appeared, yet if these were insufficient on the face of them, they could not presume that there were others which were good <sup>b</sup>.

Where however, the party suffering the recovery has no immediate title in himself, being only a remainderman or reversioner, there, a surrender by the tenant for life, in order to make a good tenant to the præcipe, or his death before the recovery suffered, will not be presumed <sup>c</sup>; but where the outstanding estate of freehold is in a trustee for the tenant in tail himself, acting under his power and direction, such a presumption will, it seems, be made <sup>d</sup>; and where a recovery has been suffered by the tenant in tail during the lifetime of the tenant for life, and possession has long gone accordingly, without any interruption by those who have had opportunities of disputing it, there also a surrender of the life estate will be presumed. This presumption however, cannot be made, where the title is disputed soon after the death of the person entitled to the estate if the recovery had not been suffered <sup>e</sup>.

The statute 14 Geo. 2nd. c. 20, enacts that 'where a person purchases an estate for valuable consideration, and a recovery was necessary to complete his title, he and those claiming under him, having been in possession, may, at the end of twenty years from the time of

such purchase, produce in evidence the deed, making the tenant to the præcipe, and such deed (duly proved) shall be good evidence that the recovery was regularly suffered, provided the grantor in such deed had a sufficient estate and power to make a tenant to the præcipe.' (Sec. 4). And by sec. 5, it is enacted, 'that after twenty years, all recoveries shall be deemed good and valid, if it appear upon the face of them that there was a tenant to the writ, and the persons joining in the same had a sufficient estate and power to suffer the recovery, notwithstanding the deed or deeds for making the tenant to the præcipe may have been lost or not appear'.

This act applies to those cases only where the party who suffered the recovery had a sufficient estate to enable him to do so; it does not alter the rules of evidence as to recoveries suffered by tenants in tail, during the existence of estates for life. Where, therefore, the party suffering the recovery had no power to suffer it, having only an estate-tail in remainder expectant on the death of a tenant for life, it is essential to prove either directly, by the necessary deed, or indirectly, by presumptive evidence, that there was a good tenant to the præcipe<sup>f</sup>. And if the mode prescribed in the deeds for suffering the recovery be manifestly irregular, there also the statute will not apply<sup>g</sup>; but if in the exemplification the tenant's name be found in the place of the demandant (a case which has been before the writer more than once), a special application must be made to the court to amend the recovery.

The object of attention with the Conveyancer, is to see that the recovery tallies with the recovery deed, as



to date, parcels, and parties; and that there is not in the previous title any outstanding estate of freehold in a dowress, jointress, tenant by the curtesy or other tenant for life, to render the assurance defective or exceptionable. On this latter point the Conveyancer is extremely jealous; and though he makes many presumptions, he feels great reluctance in presuming any thing on this head; for if there be not a clear and undoubted tenant to the præcipe, the recovery itself is void, and neither the issue in tail nor the remainder men are barred,—two classes of claimants extremely difficult to trace, and against whom the non-claim on the statute has different operations and commencements. Whatever, therefore, be the date of the recovery, the title cannot be treated as clearly unexceptionable, if a defective tenant to the præcipe be apparent on the abstract. It is on this ground, that Conveyancers require certificates of the burial of tenants for life who must long ago have paid the debt of nature. In the case of *Bridges v. Chandos*<sup>h</sup>, several presumptions on this head appear to have been made by Lord Mansfield, which are not adopted by the Conveyancer.

Fines and recoveries in Wales and the counties Palatine, levied and suffered before the late act<sup>i</sup>, are exemplified under the seals of the respective courts where they are suffered, by St. El. c. 9. s. 8; and such exemplifications are good evidence both to the courts and to the Conveyancer<sup>j</sup>; but now all fines and recoveries, to be levied and suffered after the commencement of the late act, 1 Wm. 4. c. 70<sup>k</sup>, of lands, or hereditaments in the county of Chester, or principality of Wales, are to be levied and suffered in like manner as fines and recoveries in England.

The parcels in the recovery are objects of as much attention as the parcels in a fine, and similar observations may be made on them as on the parcels in a fine. The proper place to search for a recovery is the warrant of attorney office<sup>k</sup>, where they are entered in the office-books every term alphabetically by the counties. The stamp on the exemplification should be £3. The late act repealing the second schedule of the general stamp act, exempts 'exemplifications of common recoveries.'

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13.---*Private and Local Acts.*

Some private acts are not printed; others, and the greater portion are, and in them is usually inserted a clause, that a copy printed by the king's printer shall be evidence. Such as are not printed, or which have not this clause, are proved by reference to the parliament roll<sup>l</sup>, or by an examined copy proved upon oath in court, but the Conveyancer dispenses with the oath and is content with an official copy, though I presume he may insist on examining the copy with the roll; this, however, is seldom a question, as almost all estate acts are now printed; these as between the parties are clearly good evidence; but as against strangers, it has been lately held, that they are inadmissible, though they contain the usual clause declaring them public acts<sup>m</sup>.

The principal point of attention in private acts, is the saving clause; which however is not a topic embraced by the present essay. The recitals in private acts require the same authentication as averments in ordinary deeds, the act itself being nothing more than a private assurance<sup>n</sup>.

The title of public bodies under compensation acts is rendered clear and indefeasible by the operation of the local act constituting the company, and *this*, however obscure, or defective, the title of the seller may in reality be. Certificate of payment of the money into the Bank, is the best evidence of conveyance to the company. But as it is necessary that the apparent owner of the estate should testify some assent to the sale (for in every contract there must be a seller as well as buyer), local acts usually provide that a short conveyance shall be executed by the party who has the first vested estate in the land ; which conveyance binds him and his heirs, and the act concludes all other persons having or claiming any estate or interest in remainder or otherwise. The saving clause usually exempts the rights of lords of manors only, all other persons are bound and barred on execution of the prescribed conveyance by the party in possession.

The point, therefore, for the company to regard, is to observe that they are dealing with the right person. *That* may be shewn by an abstract of the last conveyance or settlement, or more forcibly by the length of possession of the tenant for life, particularly if it confer a right not recoverable by ejectment. Having ascertained this point, the Company will not require a covenant to produce the prior title-deeds, as they have only to refer to the deed or will creating the estate in possession, and their title is complete against all the world by the omnipotence of the act. Attendant terms also need not be assigned ; and as to any unpaid legacies or other similar incumbrances, the remedy of the legatees and incumbrancers is against the money, not the land. But a mortgagee, if any, should join in

the conveyance. The stamp will be the *ad valorem* duty on conveyances to the amount of the purchase money.—Without sweeping regulations of this sort, improvements could never be effected :—the obstacles in the way of all new and untried undertakings, are ever sufficiently formidable, without adding to them insuperable objections in the title. Lord Ellenborough has said that when the company *sell*, the same remedial observations do not apply <sup>o</sup>.

It merely remains to observe, that copies of the registry of the conveyance or assignment of shares in public companies, are usually made evidence of the assignment or conveyance by the local acts constituting the company <sup>p</sup>. New River shares are real estate, and as the River runs through three counties, three fines are said to be necessary, to enable a married woman to convey a single share in this company <sup>q</sup>. In short, all shares in public companies connected with land, are considered as real estate, unless they are declared personalty by the act establishing the company; in that case, they are *bona notabilia* where the company's office is situate <sup>r</sup>. The title to any given share may be easily seen by reference to the company's clerk, but his certificate should be verified by inspection of the books.

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14.---*Inclosure.*

The title to allotments under inclosure acts is supported by shewing the prior title to the common-field lands or rights of common in lieu or respect of which

the allotments are given. When an allotment is made to one person in respect of *all* his rights within the ambit of the act, as is frequently the case, the antient title to all those rights must be inspected; for though the act gives an appeal within a specific time (six or twelve months), and renders final and conclusive all that is not appealed from, yet there is usually a clause communicating the title of the antient common-field lands or rights of common to the allotments, and those titles must therefore be inspected. The first inquiry then is,—had the allottee any and what other common-field lands or rights of common in the parish, in respect of which the allotments are made? If he had, the title to those lands must be produced, though the lands themselves have long since been sold or disposed of. This however is only necessary where the award is silent as to any appropriation of the allotments. Where the allotments are made in respect of rights belonging to specific farms or of common-field lands purchased of certain proprietors, the title of those specific lands is communicated to the allotments, and no further evidence than that which relates to those lands is required. An act to correct the inconveniences arising from one general allotment being made in respect of several rights, is now in progress through parliament.

The evidence in support of the award is a printed copy of the local inclosure act, and the purchaser may, I apprehend, insist on examining the abstract with the award itself at the vendor's expense; he is not bound to rest satisfied with an official extract, though he usually does so; and having examined the abstract, he may, I conceive, also require an official extract from the

award at the vendor's expense to accompany the title-deeds, if there be no stipulation to the contrary.

It seems clear that the purchaser is entitled, at the vendor's expense, to compare the description of the parcels in the abstract with the map usually deposited with the award; by which means he may, in most cases, be able to discover the situation of the old inclosures, and so perhaps to indentify the lands<sup>s</sup>. This identification is sometimes matter of great difficulty, by reason of the entire alteration of the boundaries occasioned by the inclosure. Where such alterations are in contemplation, or are likely to arise, it would perhaps be advisable to preserve a plan of the parish as it stood previous to the inclosure, especially if common-field lands are to be enclosed. The utility of such a plan can only be appreciated by those who know the difficulty of coming to any satisfactory conclusion on the identity of the parcels in abstracts relating to open common-field lands.

To prove a title to allotments in court, it is necessary, on the part of the lord, to give evidence of his being owner of the soil, and on the part of the commoner, to shew that he has exercised a right of common on the waste lands enclosed. It is not, however, necessary for the lord to prove, that there is such a manor existing in law as that of which he claims to be lord; it is sufficient to shew that he was owner of the estate; which may be done by proving acts of ownership<sup>t</sup>. But the Conveyancer does not require any specific proof of these circumstances, as they will in fact be apparent on the abstract, and the title will be good or bad accordingly. His object is directed to see that the award is

warranted by the act, and that it is duly made and enrolled within the specified time.

The plan of buying up the common rights, or purchasing all the open and common-field lands in a manor, and by that means making a title to the whole forest or common, is objectionable on many accounts. First, it can never be made appear that all the rights are purchased. Second, the rights of common are attached to many farms, and the title to these are frequently complicated and obscure, some perhaps defective, and they may in fact amount to half the titles in the parish ; which would engender a serious evil on every change of ownership. Third, the parties will not deliver up their deeds, and to take attested copies of all the numerous documents abstracted, would be commensurate with half the value of the property, to say nothing of the necessary covenants to produce deeds, &c. Fourth, the whole of these titles must be investigated on every succeeding sale, and a flaw in any one title would vitiate the whole ; for if all the common rights are not clearly acquired and extinguished, the lands cannot be treated as enclosed. In short, nothing but an act of parliament can give a clear and marketable title to an enclosure of open and common-field lands, or a concentration of common or forestal rights.

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15.---*Settlements.*

The absence of a settlement in an abstract is a rare occurrence. Within a period of sixty years, one marriage or family arrangement may be calculated on with

certainty; in high families, re-settlements occur at intervals of twenty or thirty years. The title under these settlements is sometimes complicated, and is commonly dependant on events. These will require strict proof, though they may be perfectly familiar to the parties. These events chiefly concern births, marriages, deaths, &c.; the consideration of which is postponed to a future chapter. A primary and important requisition, however, on a settlement, is, a certificate of the marriage, to shew that the uses have shifted; then consecutively the deaths of the tenants for life require proof; also the births, and burials if any, of all the children, to shew the vesting of the estates tail; and the division and vesting of the portions, the failure or cessation of the jointure, and the consequent existence and situation of the terms, will also require attention.

The powers of sale and exchange in the trustees are important topics in the title, if those powers have been exercised; particularly if there has been a change of trustees. Full copies of both powers should then be furnished, and the execution of them scrutinised with a jealous eye. The validity of the powers themselves will also require consideration, in which the lately agitated doctrine of perpetuities in regard to the duration of powers will be called in question. If the consent of the tenant for life be made an essential preliminary to the sale or exchange, it is difficult to see how the rules of perpetuity can be transgressed. Estates for life cannot be given to children unborn, and if the consent of a tenant in tail be essential, then the power must be subservient to the estate tail and may be barred with it by a common recovery. A power of this description to be exercised indefinitely, during the minorities of



each succeeding tenant in tail, is also, so far amenable to the preceding estate tail, that it can scarcely be said to create a perpetual and indestructible power. Powers of leasing and partition are also exposed to remarks of this kind. It is sufficient in this place to remind the reader of the difficulties a purchaser may be involved in, by reason of these doubts. The prevailing opinion, however, appears to be that they will ultimately prove unfounded; at the same time, it should be remembered that nothing short of a judicial opinion can set them at rest<sup>u</sup>. Of course, in all well drawn settlements the question is obviated by confining the powers to existing lives or twenty one years after.

If power be reserved to the grantor in a voluntary settlement to revoke all or any of the uses, a sale by him afterwards is a virtual revocation, and the purchaser need not regard the settlement further than to observe that the consideration is not a valuable one; but the deed itself should be delivered to the purchaser to accompany the title; for subsequent purchasers may require to satisfy themselves by inspection, that the case falls within the statute 27 Eliz. c. 4. s. 5, and the objects of the settlement can have no right to retain the deed, for their estates are destroyed by the statute. If a general power of revocation be reserved to the grantor in a marriage settlement, the deed, I apprehend, is by that means rendered altogether voluntary, and the issue of the marriage could not compel the specific performance of any covenant therein contained, as against a subsequent purchaser for value; and if that be so, it cannot be requisite for the grantor on exercising the power of revocation in favour of a volunteer to reserve to himself a power of revoking that

voluntary appointment. Indeed it appears to have been lately held, that even if a power require the deed of revocation to contain a power to revoke by deed, yet upon the execution of such power of revocation, the donee need not expressly reserve to himself another power to revoke.

In conclusion of this chapter on the proof of deeds, it may not be improper to add the following interrogatory, usually propounded by the court of chancery, in proof of the due execution of deeds :—

“ When and about what time, and on what day in particular, [*and if necessary, the hour of the day in the forenoon or afternoon, as the case may be,*] and where, and what, and at whose house, were and was such deeds, and every or any and which of them executed, and such receipts, and every or any and which of them, signed, by every or any and which of the parties thereto respectively, how many persons were present at the time or times of the execution of such deeds or deed, and signing of such receipt or receipts respectively; were you present at all, or any and which of such times, and who are or is the subscribing witnesses or witness to the execution of such deeds or deed, and to the signing of such receipts or receipt respectively; or every, or any and which of them, and when, and at whose house, and where, and in whose presence, did they respectively subscribe their or his names or name to the execution and signing of such deeds or deed, and receipts or receipt, and was such execution and signature executed immediately after the same respectively took place, or at any other and what time in particular afterwards? Declare, &c.”

## CHAPTER II.

### OF THE PROOF OF WILLS.

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Wills, unlike deeds, are all registered, but the proof of them in regard to real estate is much the same as the proof of deeds. The testimony of one at least of the subscribing witnesses is required, if living; or if they are all dead or cannot be found, proof of their hand-writing must be given;—by the same curious perversion, the hand-writing of the testator requires no further verification than what is implied in proving the attestation.

The original will is deposited in the registry of the ecclesiastical province where the testator had *bona notabilia*, and a copy on parchment, under seal of the ordinary or metropolitan, is delivered to the executor, together with a certificate that the will has been proved before him; which copy and certificate are called the *probate*. The original will nevertheless, is the only admissible evidence respecting a devise of real estate; but with regard to personalty, the probate copy, on the contrary, is the only admissible proof of a bequest, the original will, if tendered, not being received, except as secondary evidence. This difference is explained by recollecting, that formerly, all the goods and chattels of the deceased devolved on the ecclesiastics, who distributed them in pious uses,—and when wills were

allowed in derogation of that right, they still retained the power of authenticating the document which bequeathed away what they would otherwise have been entitled to.

With the Conveyancer, the probate is the principal object of concern. The impossibility of procuring the original will to accompany the deeds, is perhaps the reason why he attaches so much importance to this article of second rate evidence. If by the probate copy, the will appears to be duly executed, he takes for granted that the attestations are genuine, without requiring the formal proof which is called for in court.

A will thirty years old, like a deed of that date, is said to prove itself, although some of the witnesses are living and ready to be examined. In a late case a question arose, whether the thirty years were to be reckoned from the date of the will or from the death of the testator. Lord Tenterden said he was of opinion, that the rule for computing the thirty years from the date of a *deed*, was equally applicable to a *will*; the principle upon which deeds after that period were received in evidence, without proof of the execution, was, that the witnesses might be presumed to have died. But it had been urged, he added, that when the existence of an attesting witness is proved, he must be called. That however would only be a trap for a non-suit. The party producing the will might know nothing of the existence of the witness until the time of trial. The defendant might have ascertained it, and have kept his knowledge a secret up to that time, in order to defeat the claimant. The Court was therefore of opinion, that the evidence of one of the subscribing witnesses, which

was tendered, should be rejected,—thirty years having elapsed since the date of the will <sup>a</sup>.

Lord Eldon's expression of the rule is this:—‘In a court of law, a will thirty years old, if possession has gone under it, and sometimes without possession, but always with possession, if the signing be sufficiently recorded, proves itself; but if the signing be not sufficiently recorded, it would be a question whether the age proves its validity: and then possession under the will, and claiming and dealing with the property as if it had passed under the will, is cogent evidence to prove the due signing of the will, though it be not recorded <sup>b</sup>.’

The rules of evidence in regard to the proof of wills of real estate, in court, of less date than thirty years, are laid down with great clearness in several learned contemporary works <sup>c</sup>; it is therefore unnecessary, and indeed without the pale of this essay, to dilate upon the numerous cases on that subject here. It is sufficient to say, that the probate bearing the usual marks of authenticity, with the episcopal seal attached, is admitted by the Conveyancer as ample evidence both of the will and of its contents. In a court of law the probate is not even secondary evidence of a will of real estate without proof *aliunde* that it is a true copy. For the Spiritual court has no authority to authenticate a will of lands, and the seal of the court does not prove it to be a true copy, except so far as relates to personal property; hence it is, that courts require one at least of the attesting witnesses, to show clearly that the will was ‘signed by the deviser, or by some one in his presence and by his express directions,’ pursuant to the statute of frauds <sup>d</sup>. And if the will be

thirty years old (when it is said to prove itself, though not a year may have elapsed from the death of the testator), yet, whatever be its antiquity, if it be necessary to trace the title through the testator, the original will must be produced to see that it has clearly conformed to the requisitions of the act.

A purchaser however, it is conceived, could not require production of the original will for examination of the abstract, nor recover of the vendor the expense of his solicitor's journey and time in searching for and comparing the abstract with the original will, if possession has gone according to the devises therein contained, and the probate accompanies the title-deeds, and these are in the proper custody. The practice in passing a title, is to rest satisfied with the probate, and the purchaser could not, it is apprehended, successfully resist specific performance of his contract for want of the original will, unless it does not relate to personal estate; by which circumstance it would not require probate, but become a substantive and accessible document of title.

But though the Conveyancer is thus precluded from having much concern with the original will, it is essential to see that the probate bears testimony to its due execution, pursuant to the statute of frauds.—That statute enacts that ‘all devises and bequests of lands or tenements shall be in writing and signed by the party so devising the same, or by another person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.’ And moreover ‘that no devise in writing of any lands, tenements,

or hereditaments shall be revocable, otherwise than by some other will or codicil in writing, signed in the presence of three or four witnesses declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his directions and consent <sup>f</sup>.

It is scarcely necessary in a work of this nature, to run through the numerous decisions on this statute, especially as they are ably collected in indexes and works more particularly addressed to the subject than this; but it may be permitted to remark, that when it does not appear by the attestation clause that the witnesses subscribed their names in the presence of the testator, an affidavit by one of the subscribing witnesses or some other person who saw the will signed, testifying the actual fact, may be called for. If, however, the will be twenty years old, certainly if thirty, and possession has gone accordingly, a violent presumption arises in favour of the supposition that the statutory formalities have been duly complied with, and in that case, it may be doubted if such an affidavit could be insisted on, without shewing some ground to induce the belief that these requisitions have not been observed.

It is not necessary that the testator should request the witnesses to sign the will, as the attestation usually expresses; nor that the witnesses should sign in the presence of each other <sup>g</sup>; neither is it necessary that the witnesses should see the devisor sign the will, provided he acknowledge his signature in their presence <sup>h</sup>; nor on the other hand is it necessary that the devisor actually see the witnesses subscribe their names, for the statute only requires that they should sign in his pre-

sence<sup>i</sup>; which means that the witnesses should be in such a situation that the deviser might see them if he choose or had power to cast his eyes that way; for he may be blind, or in too weak a state to exercise the power of vision, yet the witnesses may be close to his bed side, which would undoubtedly be in his presence, within the meaning of the statute. In all cases where the attestation does not run in the usual phraseology it should be stated in the abstract verbatim, to afford counsel an opportunity of judging whether it conforms to the requisitions of the statute. The signature of the testator may be by a mark, but the attestation should then state that the will was read over and explained to the testator; if the attestation is silent as to this fact, the purchaser may require an affidavit from one of the witnesses or some other person present, that the will was read and explained to the deceased. In connection it may be added, that a marksman is a sufficient witness to a will within the statute of frauds<sup>j</sup>.

Where a will is informally drawn, and the fact of publication does not appear on the attestation, the Conveyancer sometimes requires an affidavit by one of the subscribing witnesses, that the testator acknowledged the will in some way in their presence. But it may be questioned whether such an affidavit could be insisted on, as the bare signature in presence of witnesses is a tacit declaration that the writing signed, is the act and deed of the party executing it. If a will therefore be duly attested, it is presumed that the witnesses actually saw what they attest, and if so, the signing in the presence of three persons is a public acknowledgment of the writing, which is all that can be required<sup>k</sup>.



As to the credibility of witnesses ; it seems that if the witness be not an interested party at the time he attests the will, his testimony will not be rejected, although he afterwards becomes so by a codicil, bequeathing him a legacy, or by marriage with one of the legatees<sup>1</sup>. The statute 25 Geo. ii. c. 6, renders null and void all legacies and bequests to any of the witnesses, without giving any option to them to take the legacy and disaffirm the will, or the reverse ; but a will relating to personal property only, is not within the statute ; though if freeholds are devised, a bequest of any part of the personalty to a witness, is rendered void by the above mentioned act<sup>m</sup>.

It appears to have been the practice formerly, when the vendor claimed under a modern will which disinherited the heir at law, to require the will to be proved in the court of chancery, by the testimony of the subscribing witnesses in a formal and expensive way, which could only be done, it is presumed, by the institution of a suit, either for specific performance, or at the instance of the heir contesting the will. The object was to preclude the possibility of interference by the heir after the purchase had been completed. The probate he may dispute at any time within thirty years of the testator's death, but if the will be proved *per testes*, he cannot after the time allowed for an appeal, institute any proceedings against the purchaser. If it appear on the face of the abstract, that the testator has devised the bulk of his property to a distant relation, or perhaps to a friend (a total stranger in blood), and that his heir or more immediate relations are left comparatively destitute, *that* presents a case in which it behoves a purchaser to scrutinise the validity of the will in every

possible way, and he very naturally requires that the will should undergo a formal proof in court against the heir unprovided for. Whether he can insist upon that requisition, has never been distinctly decided, but the impression of the profession at the present day seems to be, that such a requisition cannot be supported, even at his own expense.

In several late cases where power has been given to executors to sell in disinherison of the heir, the purchaser never thought of insisting on this requisition<sup>a</sup>, and if the will on the face of it appears to be properly executed, there really can be no pretence for putting the vendor to this expense, and even if the attestation be informal, if that informality can be supplied by an affidavit of one or all the attesting witnesses, I should think the purchaser could not on tender of such evidence, successfully resist specific performance of his contract on the ground either of the will not being formally proved *per testes*, or of the non-concurrence of the heir at law.

If for instance, the attestation omit to state that the testator was present when the witnesses subscribed their names: if one, or especially, all of them, will make an affidavit that he was present, the purchaser could not, I apprehend, put the vendor to the expense of a formal proof of the will *per testes*<sup>o</sup>. If there be any suspicion of the testator's sanity, and the purchaser at his own expense, can by the examination of the subscribing witnesses or other persons, raise a well founded doubt on the competency of the testator, *that* would be a different case, and one in which he may reasonably say, 'unless the will is completely established against the heir, I will not accept the title.' A mortgagee who is not bound

down by a written contract, may, in either case refuse to advance his money, unless the title can be secured against all claims of the heir, either by his concurrence in the mortgage, or by the will being formally proved against him. It is at all times a desirable point to obtain the concurrence of the testator's heir, even where the attestation appears formally correct and the witnesses are of unexceptionable character; for the heir may, by examining the witnesses, elicit a fatal irregularity, and thereby place the title of the purchaser in great jeopardy, unless his covenants extend to any act omitted to be done by the testator.

Every subscribing witness to a will virtually attests the fact of the testator's capacity to make it, though it is now settled<sup>p</sup>, that this fact, as well as the circumstances expressly stated in the memorandum of attestation, may be denied by a witness. And the plainest principles of justice require, that a witness should not be precluded from saying, whether the subscription of his name is or is not his hand-writing, a contrary doctrine would open a wide door to fraud; at the same time it is allowable to support the instrument by the testimony of other witnesses, against those who deny their own attestation<sup>k</sup>.

Before the year 1718, the ecclesiastical courts usually allowed a will to be delivered out for the purpose of proving it in court, on receiving security for its return<sup>q</sup>; afterwards, the registrars refused to deliver out the will on these terms, insisting upon being paid for attending with it; and for this attendance at a distance, their demands ran high. But on a bill brought in 1734, by creditors and legatees, who were not likely to

suppress the will ; one of the witnesses residing at a distance, an order was made by the court of chancery, on producing precedents of the old practice, that it should be delivered out on security<sup>r</sup> ; and in a late case Lord Eldon granted an order upon the consistory court of Durham, to deliver a will to be produced at the hearing, upon giving security, the authority of the preceding cases leaving him, his lordship thought, no other course, though he expressed much surprise that such a jurisdiction should ever have been exercised<sup>a</sup>. In one case it was ordered, that if there should be any dispute as to the security to be given for the safe custody and return of the will, it should be referred to a master in chancery to settle and adjust the same. But in Savill's case<sup>t</sup>, the court of King's bench, refused a mandamus to the prerogative court, to deliver out a will of land, leaving the party to *detinue*, or action on the case, which Twisden J. said he remembered to have been brought for this purpose. No remedy of this kind has of late days been resorted to, and the application of those actions to the case in question, would doubtless undergo great scrutiny before judgment passed, pronouncing the ecclesiastical court to have no right to the custody of instruments which have been entrusted to their keeping before time of legal memory. The cases remembered by the court do not appear.

It has been recommended to make wills of real estate on separate sheets of paper, in order that they may not be drawn into an inconsistent registry with subjects of secondary importance, but accompany, as they clearly should do, the title-deeds. To meet this view, each estate, or each estate devised to different owners, should be the subject of a separate will, which if duly executed

and attested, a purchaser, it is apprehended, could not require to be proved *per testes*, unless he could allege some suspicion of its informality or the testator's competency; the fact of the will being made a day or two before his death, could not alone create such a suspicion, without some other more forcible corroborative evidence.

*Prima facie* all pencil alterations are deliberative, and for this obvious reason; if they expressed the final intention of the deceased, why did he not resort to a more durable material? This presumption, however, like all others, may be strengthened or refuted by circumstances; for instance, if the interlineations or obliterations have rendered the sense incomplete and the papers unintelligible, it would require decisive evidence to convince the court that they were intended to be final, more especially if they were made by a testator of extraordinary accuracy when in health<sup>u</sup>; and if the will itself be written in pencil, the rule is, it seems, the same<sup>v</sup>.

If the original will be lost, the register or ledger-book of the ecclesiastical court where the will was proved, and in which the will is usually set out at length, seems to be the next best evidence<sup>w</sup>. An examined copy<sup>x</sup>, proved by the oath of the examiner (or by evidence perhaps of his hand-writing, if he be dead and no other person can authenticate the copy), is also admissible in proof of a lost will; but in that case, if the will be of recent date, the testimony of the subscribing witnesses will be requisite to prove the execution, as in other cases. The probate copy under seal of the ecclesiastical court, has been refused the credit of even secondary evidence. In an ejectment tried before

Lord Ellenborough in 1810, a clerk from Doctor's Commons swore, that he had searched in the proper place where the original ought to have been found ; but that it was no where to be discovered, and that he believed by some accident it was lost. Garrow then tendered as secondary evidence the probate of the will, *sed per* Lord Ellenborough :—This is inadmissible. In the absence of the original will, we should have had an examined copy. I cannot attach any authority to the probate as far as the will relates to real-estates, A will of lands does not require to be proved at all, and the ecclesiastical court has no authority over it. Therefore to shew that this is a true copy, we have only the seal of a court without jurisdiction upon the subject. The probate of a will devising real property is not like an office copy, which proves itself ; for office copies that are received in evidence, are delivered out by officers appointed for the purpose, as the organs of courts of competent jurisdiction.—The plaintiff was therefore non-suited v.

Hence it appears that the ground on which the probate copy is denied that evidence in court which its official character seems to demand, is not any want of authenticity in itself, but a non-conformity to the rigid and inconvenient rules adopted in Westminster Hall for the verification of all written instruments. If the original cannot be produced, the court requires an *office* copy, if it can be procured,—but to the credibility of that copy, the officer making it must be authorised by law to grant copies officially ; a circumstance rarely to be met with ; if an office copy cannot be obtained, the court is satisfied with an examined copy, but it re-

quires the person examining the copy to appear in court, and at the peril of perjury, swear to the authenticity of the copy. The probate is undoubtedly an examined copy; for the ordinary would scarcely affix his seal to a document not duly authenticated. Still it is obvious that this examination, not being made with a view to judicial testimony, cannot be conveniently proved, and it is for want of this proof, that the probate is rejected in court. The Conveyancer, however, never requires proof of the examination, and the probate therefore passes current with him on its own authority.

In a case before Wood, B. at the Worcester assizes, on proof that a will of lands had been lost, parol evidence of its contents was received from a witness who heard it read over before the testator's family on the day of his funeral\*. And in a late case in the ecclesiastical court, where it was shewn that the original will was lost, and that there was no copy in existence, a limited administration with the will (contained in an affidavit) annexed, was granted to the widow, as executrix and residuary legatee for life, on her giving justifying security: the eldest son having been personally cited, and two other children (who were minors and abroad) having also been cited by a service on the Royal Exchange, and the remaining five children consenting\*. It is obvious that such a will, without any proof of attestation or even that it was in writing, could not be of any avail as to real estate, except perhaps as a nuncupative will *in extremis*; and the case is merely introduced here to shew on what loose materials probate is sometimes granted of personal estate. But the Conveyancer, driven as he is by necessity, to treat the pro-

bate as an authentic, and in some sense, as an *original* document,—is yet never misled by the act of the ecclesiastical court, as he requires to see on the face of the probate or by extrinsic evidence, that the confection of the will was attended with the ceremonies required by law.

As to the admissibility of parol evidence in the construction of wills, the general rule is, that if there be a *latent* ambiguity raised by extrinsic circumstances, it may be explained by the same means; but if the ambiguity be *patent*, that is, arising on the face of the will itself, all reference to matter *dehors* the instrument is, as a general rule, strictly forbidden. Such ambiguities must, if possible, be removed by construction, not by averment. This, however, is in many cases quite impracticable, where the terms used are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed: if in such cases the court were to reject the only mode by which the meaning could be ascertained, viz. resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense and the law of England (which are seldom at variance), warrant a departure in this instance from the general rule.

Thus if a man worth £1,000 were to give to twenty people £1,000 each, it might be said he was insane, but it could not be argued from the deficiency of assets, that he meant something else; the legatees must in that case abate proportionably. Of that there can be



no doubt ; but suppose a legacy be given to a man by his surname only, the Christian name not being mentioned ; is not that a patent ambiguity on the face of the instrument ? So where there is a gift of stock, *that* is ambiguous : it has different meanings when used by a farmer and a merchant. So with a bequest of jewels, if by a nobleman it would pass all, but if by a jeweller, it would not pass those that he had in his shop. Thus the same expression may vary in meaning according to the circumstances of the testator, and it has never been considered an objection to the reception of extrinsic evidence in explanation of those circumstances, that the ambiguity was manifested on the face of the instrument itself<sup>b</sup>.

Numerous points on the construction of wills present themselves in this place, but they are foreign to the subject of the present treatise, and must therefore be suppressed. It is however in order to remark, that though the probate is granted in confirmation of the executors' title to the personalty only, still it is treated by the devisee, and by purchasers from him, as a muniment of title to the land ; and it appears to be conceded by the executor and legatees, that the custody of the probate after the executorship is wound up (which it usually is within a year or two after the testator's decease), belongs of right to the owner of the freehold estates and not to the owner of the leasehold or personal property ; and though the probate is but a copy and no evidence of the original will in court, still it being an authenticated copy, it passes current for the original in all dealings between man and man where the validity of the will itself is not in question, and a purchaser, it

is conceived, cannot require any other evidence of the contents of the original will than this authenticated copy; but as he relies on this copy as a muniment of title, he has, I presume, a right to look at the stamp, and to see that the probate is granted to the right party.

The probate though granted to the wrong person is good till recalled<sup>c</sup>, and therefore as to the leasehold and personalty, the revocation would not work any material injury; but as the probate in the hands of the purchaser is held as a mere muniment and not as of the substance of his title, it is reasonable that he should satisfy himself that such document is a valid instrument, and not liable to be revoked or recalled.

The sufficiency of the stamp, however, is less within the province of the purchaser, for as a copy, the probate granted by the registrar may be authentic and true, without having the *ad valorem* stamp necessary to support in court a title to the personalty, as to which, the probate is certainly invalid without the proper stamp<sup>d</sup>. But as the purchaser only uses the probate as a copy, it should be sufficient for that purpose without a stamp, as much so as an exemplified copy, which certainly does not require the *probate* stamp.

In conclusion, it may be proper to remark, that the purchaser is entitled to examine the abstract with the probate or an office copy of the will; and he is, by the usual practice, entitled to the custody of these instruments, if they are in the vendor's possession and do not relate to other property retained by him. If they do, the purchaser is entitled to a covenant from the vendor

to produce them to him as occasion shall require,—though being matters *quasi* of record, he is not perhaps entitled to attested copies; and it may be doubted whether he could insist on a covenant to produce the probate, if it be in the hands of a third person. But though he is not entitled to an attested copy of the probate, he is entitled to an office copy of the will, as we shall have occasion to remark more at large in the course of the next chapter.

## CHAPTER III.

### OF THE PRODUCTION AND CUSTODY OF DOCUMENTARY EVIDENCE.

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|--------------------------------|-------------------------------------|
| 1. <i>Production of Deeds.</i> | 3. <i>General Right to inspect.</i> |
| 2. <i>Attested Copies.</i>     | 4. <i>Covenant to produce.</i>      |
| 5. <i>Custody of Deeds.</i>    |                                     |
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#### 1.---*Production of Deeds.*

It belongs to the vendor to produce the deeds and wills for examination of the abstract, but he is not bound to tender them to the purchaser or his solicitor for this purpose, as the purchaser is the conveyance. Formerly the deeds themselves were at once handed to the purchaser, and his solicitor laid them before counsel, who prepared an abstract, on which he delivered his opinion of the title. But as the doctrine of equitable deposits became more settled, greater importance was attached to the possession of the deeds, and this practice was at length abandoned.

The vendor is now considered as entitled to the custody of the deeds till the contract is completed; in short, he cannot be compelled to part with the evidences of his title until the purchase money and conveyance have been tendered to him. He is in one sense a *trustee* for the purchaser, from the execution of the

contract ; but he has also a lien on the land for his purchase money unpaid, and this lien confers a right to the deeds so long as it continues. As vendor also, he has certain rights and liabilities, which prevent his being treated as an ordinary trustee.

It being then settled that the vendor cannot be compelled to part with his deeds, it comes next in order to consider, whether he is bound to attend with them on the purchaser, or whether the purchaser is to attend him, for the purpose of examining and verifying the abstract with the deeds and papers in his possession. As to the deeds and papers not in the vendor's possession, it seems admitted that the purchaser is entitled to recover the expense of proving the abstract with them of the vendor ; but as to the deeds in the vendor's own possession, the purchaser must bear the expense of his solicitor's journey to the vendor's residence, and his charge for loss of time and attendance in travelling and examining the abstract with the deeds, provided the contract is completed ; but if the title prove defective, and the purchaser declares off his bargain, he can recover of the vendor the whole expense of his solicitor's charges and expenses in the investigation of the title. If the bulk of the deeds are in the hands of a mortgagee, the purchaser must bear the expense of examining the abstract with them ; for that is the same as if they were in the hands of the vendor himself.

The rule I take to be this :—the expense of examining and investigating the title is to be borne by the purchaser, if the contract is completed ; but if any of the deeds are in the hands of lien-holders who reside at inconvenient distances, the *extra* expense occasioned

by that circumstance—originating as it does with the vendor—must be borne by him. On a sale before the master, the presumption is, that the deeds are in his office; if therefore it becomes necessary to send into the country to examine the deeds, the expense of that journey falls of right on the seller. This I apprehend to be the true interpretation of a case referred to in a learned cotemporary work<sup>a</sup>, though a contrary inference may perhaps be deduced from the general observations there used.

No rule however, is entirely free from exception. A case may be suggested where the purchaser may reasonably say, ‘the great expense of investigating the title is a surprise upon me, and such as I would not have incurred in addition to the price I am giving for the estate.’ For instance, if the vendor reside at York, and the purchaser in London, and the property, and sale, are both in London, and the particulars do not disclose the fact that the vendor resides at York; it may be necessary for the purchaser’s solicitor to make one or more journies to York, if the vendor refuses to transmit the deeds to his solicitor’s town agent for examination of the abstract. On the completion of the contract, has not the purchaser a fair claim on the vendor for some remuneration in respect of the expense occasioned by his residence at so great a distance? On the ground of concealment, unintentional though it be, the purchaser would not be altogether without a case in a court of justice.

If some of the deeds are at Liverpool and others at Manchester, the expense of examining the abstract with those, even if the purchase is completed, falls on the

vendor; but if the solicitor neglect to examine all the deeds at Liverpool or Manchester, which by due diligence and enquiry he might have accomplished, the vendor is not to be charged with the expense of a second journey, to amend what a careful agent might, with due diligence, have performed; the expense of that journey falls of right on the purchaser. But this is wandering from the subject, though it was necessary to offer a few remarks on this head, as provision is seldom made, either in specially drawn contracts or conditions, for the liquidation of these expenses. It clearly belongs to the vendor to produce the deeds in his own possession, and to procure the production of those which are in the hands of other persons, to enable the purchaser or his solicitor to verify and examine the abstract; the expense attending that production belongs to the vendor, the expense attending the examination to the purchaser; the additional expense occasioned to the purchaser in attending to examine some deeds elsewhere is, in fact, a part of the expense of production, and falls on the seller. This seems to be the true and concise expression of the rule.

These observations, it is apprehended, apply as well to deeds and documents of record, such as fines, recoveries, wills, and deeds enrolled, as to deeds *in pais*; for though a purchaser is not entitled to attested copies of documents of record, yet if the vendor cannot verify his abstract without reference to the rolls of any court, the expense of the purchaser's solicitor in making such reference falls by analogy on the vendor.

But this subject requires some consideration. The term record, as applied to deeds, is of vague signification.

Some documents are kept by the court, and a copy only given out, as wills, for instance, others, as bargains and sale are copied by the officers of the court, and the originals, with a memorandum of enrolment endorsed, are re-delivered to the parties. The probate of a will, if it relate to personal as well as real estate, is, it is apprehended, the only evidence of the will which a purchaser can require. It is with regard to dealings out of court, the best and proper evidence; which should if possible be obtained, as well for the present as for future occasions; but if the vendor cannot procure the probate from any cause, the purchaser may surely rest satisfied with reference to the original will, without any very rigid enquiries as to the fate or custody of the probate; for possession of that document alone, could not create any lien on the real estates; but the expense of this reference must be borne by the vendor. With regard to a bargain and sale the case is different, a *copy* only is recorded, the original is delivered to the parties, a deposit of which may create a lien on the land; and though an examined copy of the enrolment is by the statute 10 Anne, c. 18, s. 3. made good evidence of a bargain and sale in court, yet the purchaser is not bound to rest satisfied with the secondary evidence of even a legalised copy, unless some proof is adduced to shew the actual loss or destruction of the original; for it may be in the hands of a dormant incumbrancer, which would prove a source of great annoyance to the purchaser. In such case the enrolment is not the first and best evidence of the deed abstracted; and this applies with greater force to deeds which are enrolled merely for safe custody, and which by law do not require enrolment. The expense of the necessary proof to let in the copy, clearly belongs to the vendor.—With respect to fines and recoveries, these



are properly *records*; but the indentures and exemplifications are the best and first evidence of them, and the purchaser cannot be required to rest satisfied with the record itself, unless the loss or destruction of the original be proved.

Then supposing the vendor to have made a case, in which it becomes necessary to examine the abstract with the record, and has expressed himself ready to pay the purchaser's expense in examining the abstract therewith, can the purchaser reject that offer and require a full copy of the record, or even an extract, at the vendor's expense? it is conceived that he cannot; for all that he can require is a verification of the deeds abstracted, and a case being made for the admission of other evidence than the best, the abstract under these circumstances, would be properly verified by reference to that evidence; the purchaser's right to some permanent evidence of the deeds referred to, is another question. It is sufficient if the vendor at his own expense prove the deeds abstracted, and whether the purchaser has a journey to make into an adjacent county to examine the deeds, or to town to examine the record, can make no difference, he is thus far entitled to inspection only, and not to copies of all the deeds to carry home with him for his more convenient or minute inspection and perusal. His right therefore to official copies of records must rest on other considerations than those connected with the examination of the abstract.

With respect to examining the abstract with the original will, the officers of the ecclesiastical court would doubtless resist a requisition to compare any copy or extract with the record; they would say, we

will give you a copy of the whole or any particular part, but we cannot allow you to make a copy or extract yourself, or to compare an extract with the original, which is much the same thing as copying. Whether they are legally justified in returning this monopolising answer may be justly doubted; for they admit a right to peruse and to require copies; then is not the party entitled to see that he has a correct copy? and if he has that right at the time, does the lapse of a year or any other indefinite period destroy his right to see that he really has what he pays for, a true and correct copy? if that be so, he surely has a right to compare a copy of that corrected copy, and so an abstract, which is only a concentrated copy. The question is, whether the ecclesiastical court can legally refuse permission to compare an abstract of one of their own copies, viz. the probate, with the original will of real estate? Over that part of the will, they have confessedly no legal controul, and their right to the exclusive privilege of copying it, *remains* to be decided.

The order for production of deeds before a master, does not in terms embrace a direction to deposit them in his office, but it is always considered that the holder is bound to *leave* them with the master, that they may be accessible, not only to him, but to all parties in the cause during the progress of the suit. In a late case the Vice Chancellor was of opinion, that under the usual order for production of books, papers, and writings, the master was at liberty, without any further order, to direct the party to *leave* the books, &c. in his office, so long as he should think any useful purpose would be answered by their remaining there, and then to allow the party to take them back <sup>b</sup>.

The production of deeds under an order of court, is always accompanied with an affidavit, that they are all the deeds, papers, and writings in the party's possession or power, relating to the matter in dispute. But it is in the discretion of the master to determine *what* deeds, books, papers, or writings are to be produced, and *when* and for how long a time they are to be left in his office; or, in case he should not deem it necessary that they should be left or deposited with him, then he may give directions for the *inspection* thereof by the parties requiring it, at such time and in such manner as he shall deem expedient. Should the papers and writings in the defendant's custody, relate to other estates or matters, as well as to the matter in dispute, he will not be compelled to deposit these; but the affidavit may contain two schedules, the one embracing deeds relating solely to the matter in dispute, and the other, those which relate to other matters: the deeds contained in the first schedule will be ordered to be deposited, and the others to be inspected at all convenient times by the parties interested in the cause <sup>c</sup>.

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2.---Of *Attested Copies.*

The abstract having been examined and the title approved, the next question is whether the several deeds abstracted will be handed over to the purchaser on the completion of the contract. Formerly when the vendor warranted the title against all the world, he was allowed to retain the deeds, the better to enable him to defend the possession which he thus took upon himself to vouch <sup>d</sup>. But now the vendor covenants for his own acts and deeds only, and not for the defaults and in-

cumbrances of former proprietors ; these the purchaser takes upon himself. The object of the abstract is to shew him that no such incumbrances exist ; and it is to guard against any surprise on this head, that the purchaser requires to see a proper chain of legal covenants from a reasonable distance of time ; which if there be not, he may, it is apprehended, either insist on general covenants from *his* vendor or reject the title. The contrary, at all events, remains to be decided, and the simple boon of *general* covenants may be given, without pronouncing all titles not having this regular chain of covenants, unmarketable.

One consequence of the purchaser's taking the title on himself, is a right to the possession of the title-deeds, provided they relate exclusively to the land sold, but if they relate to other property which is retained by the vendor, though of smaller value, I have always understood the practice to be, that the vendor is entitled to retain the deeds, but then he must give the purchaser *attested copies* of all the deeds abstracted which are not of record sufficient to make a title, at his own expense, and execute a covenant to produce them at the purchaser's expense, unless there be an original stipulation to the contrary.

The value of attested copies is not easily appreciated, first, they are of no service in ejectment, and second, the purchaser can insist on examining the abstract with the deeds. He may and frequently does rest satisfied with an examination by attested copies, particularly if on the face of them the deeds clearly relate to other property ; but the purchaser has certainly a right to some further evidence of the title on completion of his purchase than the bare abstract, which is merely a

common office document, of little more value than a draft; attested copies supply this temporary evidence, and as he cannot possibly have the originals, no better substitute presents itself.

The next question is,—of what deeds and documents is the purchaser entitled to attested copies? The answer is, only of such as are necessary to make a title, and not to any which are of record. As to the period necessary to shew a clear title, that may be sixty, seventy, or eighty years, as circumstances occur. If the first deed in the abstract be the destruction of an estate tail, it is necessary to abstract in chief and not merely by recital, the deed or will creating that entail, to shew that the party attempting to destroy it and to cut off the remainders had a clear right to do so, and has used the proper means of accomplishing those objects, though the deed creating the entail may carry the title back considerably beyond the period of sixty years. But the purchaser cannot surely require attested copies of all the antient deeds in the vendor's possession or which may be found deposited with the muniments of title. These may give a history for a century or more, and can be of no earthly use in themselves, much less in the shape of attested copies. The vendor is not, by the common practice, considered bound, nor is there any thing in the late case of *Prosser v. Watts*<sup>e</sup>, which warrants the position, that he is bound to abstract the whole bundle of 'old deeds' in his possession. The observations of the court in that case, are the other way, namely, that it is not necessary for the vendor to abstract all the deeds recited in the more antient documents of his title; and if that be so, the purchaser can scarcely be entitled to attested copies of a work of supererogation.

In reference to documents on record, the rule is, that the purchaser is not entitled to attested copies of these, as he can by appealing to the record, which is always extant, obtain more authentic evidence than he can by an unsworn copy. It is however said, that a purchaser may in some cases obtain attested copies of even instruments on record; for that he is entitled to examine the abstract with the original title-deeds or with attested copies of them, and that if a vendor has not the instrument itself, and cannot obtain it, he is bound to procure an attested copy of it, to enable the purchaser to ascertain that the abstract is correct; and when it is obtained, the purchaser is, of course, entitled to it on the completion of the purchase; unless indeed the vendor retains other estates holden under the same title<sup>f</sup>. Upon such a requisition, may not the vendor say, I will be at the expense of your examining the abstract with the record itself? then, being referred to the *best*, could the purchaser insist on being furnished with *secondary* evidence for *authentication* of the abstract? Secondly, what right of property has the purchaser in the attested copy of a record, procured and paid for by another person,—for *his* satisfaction it is true, but only for his satisfaction and not for his future use. The rule is, that he is *not* entitled to attested copies of record, and as that which cannot be required directly cannot be obtained obliquely, he could not, I apprehend, maintain an action of trover for such a document, if the vendor refused to give it up.

Courts of record are, the high court of Parliament; the courts of King's bench and Common Pleas, at Westminster; the law sides of the courts of Chancery and Exchequer; the court Leet; the court of Hustings in

the city of London ; and the court of Great Sessions in Wales. Attested copies of deeds enrolled in any of these courts cannot, therefore, in any case, be required, where the enrolment was made under a statutable requisition, nor in other cases where the deeds in question are necessary only for the purpose of supporting the purchaser's title against the party by whom they were acknowledged, or some person claiming under him ; except only for the purpose of comparing them with the abstract, where the deeds themselves are not in the vendor's possession. But neither the Prerogative court of the Archbishop of Canterbury, nor any other Ecclesiastical court, are, strictly speaking, courts of record ; nor are the courts Baron incident to manors (whether freehold or customary), nor the court of the hundred, of the sheriffs or county courts, nor the courts appertaining to the counties palatine of Chester, Lancaster, and Durham, or the franchise of Ely<sup>h</sup>.

Hence of *Wills* or other instruments registered in these courts, attested copies, i. e. copies extracted from the books of the registry, and attested by the proper officer as true, may be required at the vendor's expense ; unless it were otherwise provided for at the time of purchase<sup>i</sup>. In common parlance, wills are frequently spoken of as records ;—a term comparatively true in reference to deeds which pass from hand to hand. An attested copy of the probate may perhaps be of as much real value as an office copy of the will, but as the probate is in itself only a secondary instrument, the purchaser is reasonably entitled to something more than a copy of a copy. If he cannot have the probate, he is entitled to an office copy, which, as above observed, is of much the same nature as an attested copy.

With respect to attested copies it is further observable, that even trustees and assignees of bankrupt<sup>i</sup>, are bound to furnish them, if they have neglected the precaution of introducing a stipulation to the contrary in the contract. Thus on a motion before Lord Eldon in 1801, that attested copies be delivered to the purchasers at the vendor's expense; Sir S. Romilly objected on the ground of the great inconvenience and expense in this case, there being 144 lots; and on the authority of a case before Lord Rosslyn, where such a request was refused on an undertaking to procure a covenant to produce the deeds.

Lord Eldon. C.—This case is of great consequence. There being 144 lots in the sale of this estate, what an infinite number of attested copies may be necessary. The old practice was precisely according to the motion. The case before Lord Rosslyn, I apprehend, went upon a covenant, as matter of agreement upon the sale, that the vendor should produce the original title deeds; and Lord Rosslyn construed it, not only, that he engaged to produce the title deeds, but as a negative stipulation, that he should not give attested copies. The pressure of the stamp duties, I believe, led to that determination. Purchasers have set a value upon these attested copies, which does not belong to them. They are waste paper upon an ejectment, unless between the parties themselves. It has struck me as very convenient, that a short act of parliament should be passed, declaring that a copy certified by the Master to be a true copy should be evidence. I think you must give them attested copies, unless you leave the originals, or make some other proposal in the Master's office. It will throw a prodigious expense upon the trust, if all the purchasers



are to have attested copies ; and yet I rather think, they are entitled. What is now required is reasonable enough ; not copies of all the deeds, but only so far back as to make a title : that is, to an estate tail that has been barred \*.—This doctrine stands confirmed by a later decision<sup>1</sup>, and must now be considered as the settled practice of the profession.

It was remarked by the counsel in the first cause (Sir A. Hart, late Chan. for Ireland), that in *Bird v. Lefevre*, the lots were more than 200, and that the copies came to £1,000. Still more wonderful calculations are made by a learned cotemporary text-writer ; but it seems clear that the purchaser of several lots is not entitled to put the vendor to the expense of attested copies for each lot. It rarely happens that there are 200 purchasers, though there may be twice that number of lots. The Real Property Commissioners have noticed in their second report several instances of serious loss occasioned by a want of attention to this liability. It must be presumed that these cases are well authenticated. In one instance, a purchaser of a small property, finding himself entitled to insist upon attested copies and a covenant for production, which would have cost more than the amount of the purchase money, consented to wave his right, only on the terms of having the whole estate for nothing. In another and more recent case, where an estate had been sold in several small lots, the expense of the attested copies, which were insisted upon by the purchasers, exceeded the whole amount of the purchase money<sup>m</sup>.

The short rule as to attested copies is, that the purchaser is entitled to attested copies at the vendor's ex-

pense, not of all the deeds in the abstract, but only of such as are necessary to make a title<sup>a</sup>, and not to deeds and documents of record, such as fines, recoveries, bargains and sale, and the like; but it may be doubted whether he is not entitled to attested copies of deeds enrolled merely for safe custody. Such enrolments are good as between the parties, but not as against strangers. The reasoning however against giving attested copies of records will be found to apply as well to this description of record as to any other. With respect to wills, the purchaser, if he cannot have the probate copy, is entitled to an office copy, as above noticed. The stamp on attested copies is, as far as the writer's experience extends, always paid for by the vendor; indeed, if he is to give copies they should be as *perfect* as the law requires. Copies of deeds read in evidence as *copies*, require no stamp<sup>a</sup>, unless they are made for the purpose of evidence, as attested copies are; *these* require a stamp by the express provisions of the 55 Geo. iii. c. 184, yet if the deed were lost, it remains to be adjudged, whether an attested copy without a stamp would be rejected. If not, the value of a stamped copy is not very obvious, further than to forestall the objection.

To avoid this expensive liability in regard to attested copies, the vendor should always stipulate, either that he will not be bound to furnish attested copies, or that if they are required, his solicitor shall prepare them at the purchaser's expense. A stipulation that the purchaser shall be furnished with a covenant to produce the deeds, amounts to a denial of attested copies at the vendor's expense. So notice to the purchaser, at the time of sale, that he cannot have the deeds, is tanta-

mount to a stipulation that he shall not demand attested copies at the seller's expense °.

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3.---General right to inspect.

The covenant to produce deeds is a necessary concomitant to attested copies ; but before we proceed to estimate the value of this covenant, it may not be amiss to inquire, what right a purchaser has to inspect the title-deeds belonging to his estate in the hands of another person, without a covenant. *Prima facie*, he will have a better right to the deeds than a stranger who has no interest in any part of the lands comprised in them. Against such a person he has not only a right to inspect, but to recover the deeds themselves in an action of trover. It is laid down broadly by Gibbs C.J. that a person who is entitled to the land has a right to the title-deeds belonging to that land <sup>p</sup>, i. e. as against a person who has no interest in the property ; and *this*, I presume, whether the owner of the land has a grant of deeds in his conveyance or not ; for as between those litigant parties, it cannot be contended at the present day (whatever it might have been formerly, when conveyancing was hampered with the abstruse doctrines of warranty), that a vendor, conveying away all his estate and interest in the land, has a right to retain the deeds, to make threadpapers for his daughters or game directions for his friends ; for what other use can they be to him ? The purchaser would surely not be remediless at law in such a case. In fact it has been held, that in a court of law, an action of trover may be maintained for title-deeds after refusal <sup>q</sup>, provided the plaintiff can prove a right of property and a right of possession in them <sup>r</sup>.

Then suppose the vendor retains any part of the property; and makes a simple conveyance to the purchaser, without, of course, any grant of deeds, as he retains them himself,—and without any covenant to produce the deeds; has the purchaser no remedy at law to inspect those deeds as often as occasion shall require? disclaiming at the same time, if required, any right or interest in the lands not conveyed to him. The learned R. P. Commissioners in their second report say, he is entirely without remedy at law<sup>s</sup>. They have no doubt well considered the point, and it may be rash to offer any observations on so matured an opinion.

It is, however, submitted that by a *subpœna duces tecum* the purchaser could insist on the production of the deeds in court in any trial or hearing respecting the title to his own land<sup>t</sup>; it is clear the party served with the *subpœna* must produce the deeds in court in obedience to the writ; but then if he states that they are his *title-deeds*, no judge (said the court in *Pickering v. Noyes*) would ever compel him to open them<sup>u</sup>. So in another case at *Nisi Prius*, Abbot C. J. said it was perfectly clear, that a man is not bound to produce his *title-deeds* to an estate<sup>v</sup>. But it may be asked, what *title* has the holder of the deeds to the estate in question—in the teeth of a conveyance by him to the plaintiff? The witness cannot predicate in such a case, that the *title-deeds* are *his*, for as to the matter in dispute, they are the *title-deeds* of the plaintiff—though they are legally in his possession as the other's trustee. Such a case, it is apprehended, was not the one in contemplation of the court when it said, that the bare statement of a witness that the deeds are *his* shall protect him from disclosing their contents in the face of a case shewing that the deeds are not *his*.

The rule as laid down in the Exchequer of pleas, is, that where one part only of a deed is executed, in which several have an interest, inspection may be obtained against the party who has the custody of it, he being considered as a mere trustee for the other party<sup>v</sup>. A case of some hardship may occur if the title be defective, as then the whole property might be exposed to the attacks of hostile claimants. But the inconvenience of a barely possible case, (and that case in itself a suppression of justice,) should not prevent the general assertion of a right so palpable as the one under consideration. I cannot think the purchaser would in a court which aims at substantial justice, meet with an answer which would have the effect of confirming the wrongful owner in possession of the property.

Then if inspection may be compelled in court, the general right is established; the only consequence of a refusal to permit the deeds to be inspected out of court, would be the additional expense of legal proceedings to compel such production and inspection in court. But though a party may have a right to inspect deeds in which he clearly has a joint or common interest, it is not so clear that he has a right to take copies of them; but upon a little consideration, the one seems to follow as a matter of course on the other<sup>x</sup>.

Upon the whole, it is submitted that a party having an undeniable right and title to land, has such an interest and property in the title-deeds relating to that land, that he can at any time, compel inspection and production of the deeds at law; if it were otherwise, one tenant in common having the deeds, might hold his companions at arm's length;—to say nothing of the effects of such a disastrous doctrine on the complicated

intercourse in this great town of commercial partnerships.

In equity, the general rule is, that the plaintiff is entitled to the production of a deed which *sustains* his title, but he has no right to inspect one which gives an adverse title to the defendant *v.* In *Fain v. Ayres* <sup>2</sup>, the plaintiff's right to inspect the defendants deeds, which were the root of his title, seemed admitted, the question was whether the plaintiff had an equity to call on the defendant for a *covenant* to produce them, which might be clearly used at law. The Vice Chancellor strongly inclined to think that the plaintiff had such an equity, and he was informed that the Lord Chancellor had expressed an opinion to that effect. This case is noticed more fully in the next section.

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4.---Of *Covenant to produce Deeds.*

Under these circumstances of doubt as to the general right at law to compel the production of deeds, it would be unwise to omit any opportunity of obtaining a *covenant* for their production from the holder, where it can be done. The first and most important consideration on this covenant, is its currency with the land. To ensure this, there must be a legal privity between the covenanting parties. If, therefore, lands are conveyed to A. to such uses as B. shall appoint, and B. appoints to C. and covenants to produce the deeds to him, this is a collateral covenant, and such as could not be enforced by C.'s assignee.

The question then is, whether the want of a covenant

which shall run with the land in sale, is a valid objection to the title of that land. That the covenant does not run with the land belonging to the party in possession of the deeds, is clearly no objection to the title of the property contracted to be sold. If that were the case, there would be scarcely a marketable title in the kingdom, where the deeds are not delivered to the party.

Sir J. Leach, V. C. is reported to have said, that a purchaser is not bound to complete his contract without the title-deeds, or a *legal covenant* to produce them; a right in equity to compel production of the deeds would not be an answer, he added; the party must have not only a *legal right* but a *legal covenant*, according to the strict interpretation of his Honour's judgment in the case alluded to\*. The Real Property Commissioners adopting this opinion, have said, 'in cases where no covenant for production of deeds can be obtained, or where a covenant is ineffectual; it was formerly supposed, that persons interested might obtain the production of them by the assistance of a court of equity; but since a late decision, (the case above referred to) the existence of such a right is questionable; if it exists, the title is still unmarketable without a covenant which can be enforced at law by the purchaser.'

This is undoubtedly grave authority, but the whole depends on the opinion of his Honour the Vice Chancellor. No case is referred to in the judgment, nor is any particular reason adduced for the requisition of a legal covenant as well as an equitable and legal right. In practice that requisition is disregarded, or rather it is found impossible in many cases to be complied with.

It may be fairly estimated that nine-tenths of the existing covenants to produce deeds are not legal covenants running with the land.

A little reflection will shew the inconsistency of requiring such a covenant in all cases. Suppose an estate be conveyed to A. to such uses as B. shall appoint, &c. ; every one knows that B. is the owner of the property, and has the deeds ; if he sells part of the land to C. and conveys it to him by appointment, with a covenant to produce the deeds : is C. to be told that the actual holder of the deeds is not the proper person to enter into the covenant, and that his title is unmarketable because he did not take the covenant from the releasee (A.), who never had the deeds and certainly would never have entered into the covenant ?

It is understood that his Honour has lately expressed some qualification of this doctrine at the rolls, and it certainly remains to be decided on solemn argument, that when a purchaser has a covenant to produce the deeds from the actual holder, that his title is marketable only so long as that covenant continues by accidental circumstances a legal one. At the same time it must be remembered, that these authorities demand our acquiescence until the contrary is decided, though the doctrine they inculcate may have the effect of invalidating a very great proportion of titles in the kingdom, where the deeds are not in the hands of the owners.

In a subsequent case it became a question, whether a vendor is bound under his covenant for further assurance to execute a covenant to produce the title-deeds ; in which, the same learned judge said, ' I do not think



that there has been a judicial decision upon the particular point, whether, under a covenant for further assurance in a conveyance, a new deed of covenant to produce title-deeds may be required. But, whatever doubt there may be upon that point, this bill, stating that the plaintiff has re-sold the property, prays alternatively, either a new deed of covenant to produce, or the actual production of the title-deeds, to enable the plaintiff to shew a marketable title upon his re-sale. The defendant's title-deeds, being the root of the plaintiff's title, and in that sense, a sort of common property, *I strongly incline to think, that the plaintiff has an equity to that extent*; and I am informed, that the Lord Chancellor has expressed an opinion to that effect <sup>b</sup>.

In this case the purchaser's general right to a production of the deeds seems acknowledged, which in the former case appears to have been denied, or at all events disregarded in the question of title; and it does seem an extraordinary doctrine to say, that though the party has an available right to the benefit sought, yet, inasmuch as he cannot recover it by a particular mode, his title is rendered unsaleable at a fair and market price. A point obnoxious to these remarks, cannot, it is submitted, be considered as finally settled.

In order to ensure the currency of the covenant with the land, it has been recommended to drop the appointment, and to take the conveyance by lease and release only. If the vendor be himself the releasee to uses in the conveyance to him (that conveyance not being by appointment to uses), the common mode of conveying the lands from him by appointment and release, seems unobjectionable; for the covenants in the con-

veyance to the vendor being with the person who unites the characters of seisinee and *cestui que use*, they would be available in the hands of his assignee, whether that person be in by the common or the statute law; but if the vendor be not the releasee to uses in his own conveyance, then the covenants given to him by the former proprietor are collateral to the land, and an action of covenant could not be maintained on them by an assignee. It remains, however, to be decided generally, whether the want of a legal chain of covenants for title for a period of sixty years back, is a valid and fatal objection to a title. Many arguments from theory, but more powerful ones from practice, present themselves against the adoption of such an inconvenient doctrine. It is however to be lamented that practical property lawyers are never allowed a share in the dispensation of rules, the effect of which in the perspective, it is scarcely competent for a mind occupied during life on matters of a totally different character fully and clearly to appreciate. The temerity of a Conveyancer in delivering an opinion on a point of special pleading or equity-drafting, would be justly reprobated; but the persons most thoroughly versed in those subjects, are, it seems, at the present day, the proper and legitimate oracles of Property Law!

The covenant to produce deeds is commonly said to be lost by the holder aliening the lands in respect of which he was allowed the custody of the deeds<sup>c</sup>. It is true, he may with the estate deliver over the deeds to a purchaser, but that does not exonerate him or his heirs from his covenant to produce the deeds. If he has neglected to take any legal obligation from the second purchrser to produce the deeds when he shall be called

on so to do, and cannot prevail on him to produce them on any given occasion, then he, and his heirs if bound, are liable to an action on the covenant to produce, and damages to the amount of the injury proved, will be given against them ; so that it is not exactly true to say, that by the alienation of the covenantor, the covenantee loses the benefit of his covenant altogether, for it is only so in case the covenantor be a needy man ; and it is certain that the covenantee's general right to enforce production of the deeds at law or in equity, remains unprejudiced by the inefficacy of that or any other covenant.

Hence appears the necessity of obtaining from the purchaser, where the vendor has entered into a prior covenant to produce the deeds, a covenant on his part to produce the deeds to the vendor and his covenantees ; but it may be doubted whether such a covenant could be insisted on if nothing was said concerning it in the original contract. In short, the vendor cannot, I apprehend, insist either on a covenant to produce the deeds to himself, rendered as he is by the conveyance, a stranger to the land ; nor a covenant with the former purchaser to produce the deeds to *him*, for *he* has already a covenant for that purpose, which is as available as *any* the present purchaser could give, that is, supposing it unimpeachable for want of legal privity between the covenanting parties,—a quality which that purchaser should have looked to when he purchased the land.

Trustees and mortgagees uniformly evince great reluctance in entering into any covenants, and when they are prevailed on to execute a covenant to produce deeds, they always insist on a proviso that the covenant shall

be binding only so long as they have possession of the deeds. It is not necessary to the validity of the covenant that the deeds be in the actual custody of the covenantor, and therefore the vendor's covenant is unimpeachable on the ground of inconsistency; but if the trustee or mortgagee has the legal estate, the concurrent covenant of the vendor that he will produce the deeds generally, is a collateral covenant; and the legal covenant is by the proviso destroyed when the deeds are handed over to a purchaser. The effect of such a condition is therefore to deprive the present purchaser of the very article which may be wanting to make his title marketable. The only remedy for this difficulty is to require a reconveyance from the trustee or mortgagee to the vendor before he conveys to the purchaser; but this is never done in practice, and it may therefore be questionable whether a purchaser could insist on a departure from adopted rules.

A less objectionable addition to the covenant to produce deeds is a proviso, making it void if the covenantor shall part with the deeds and procure from the person to whom they are delivered a covenant to produce them to the present covenantee; such a proviso is not very common, but if the original covenant be collateral, I should consider it rather advantageous than otherwise, provided the expense of such future covenant be thrown by express stipulation on the covenantor. It should however be remembered that such future covenant would be collateral to the land of the covenantee, and he will have to consider, if the covenant he is about to take is a legal one, whether he will accede to the introduction of a proviso which may have a prejudicial effect on his title. The vendor, I apprehend, has no

voice in the matter, it being at the option of the purchaser whether he will dispense with an ingredient in the covenant, to which, by the present doctrine, he is clearly entitled.—The covenant to *produce* deeds, does not usually authorise the covenantee to *transcribe* or copy them; the covenantor will not always permit this; but he frequently engages to deliver copies at 4d. per folio; in that case, the covenantee must doubtless have a right to examine the copies with the original deeds. Whether the purchaser can insist on the reservation of a right to copy the deeds himself, is answered by considering that to perform that operation, he must in some sort have possession of the deeds, which clearly does not belong to him.

It has been said that a covenant to produce all deeds papers and writings generally, without a schedule, is a mere nullity; still, if it can be shewn that the covenantor is in possession of a document or set of documents relating to the lands, he would without doubt be held bound by his covenant. The words of such general covenants usually run, that the vendor shall produce all the deeds in his possession at the time of the request made; these could be easily ascertained by a 'fishing bill' in equity. It is however best to insert a schedule where it can be conveniently done.

But here, also, another unsettled question presents itself, as to what period of time this schedule should embrace. Mr. Fearne thought that it should include only those deeds which have occurred since the last covenant to produce<sup>d</sup>; but that is a very objectionable position and would greatly lessen the benefit of the covenant, particularly if the former covenant has become from circumstances virtually useless. As the covenant

to produce is concomitant on the right to attested copies, it seems reasonable that the schedule should embrace all the deeds and documents that may be necessary to make a title. But as the reason for refusing attested copies of records does not apply to covenants to produce deeds, viz. the expense, this covenant should embrace indentures of fine, exemplifications of recovery, and probates of wills, as well as all other deeds, papers, and writings in the covenantor's possession.

The expense of preparing and engrossing the covenant to produce deeds, as also the stamp, falls on the purchaser, but the expense of procuring its execution, belongs to the vendor. As the principal expense belongs to the purchaser, he may either insert this covenant in his conveyance, or take it by a separate deed. The latter plan is on many accounts the preferable. The notice which this reference to old deeds and their contents, and thereby collaterally to dormant, though perhaps satisfied, incumbrances, is one reason why the purchaser should not on the face of his conveyance allow any trace of these objectionable features in his title. The present manifest disposition to reform, and the consequent probable adoption of a general registration, are also among the reasons inducing caution on this head, for it would be obviously inconvenient to begin the root of a title with a conveyance referring by recital or schedule to a variety of worn out assurances.

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5.---*Custody of Deeds.*

It is stated by the late Mr. Sanders as a point clearly settled, that the feoffee or grantee to uses is entitled to

the custody of the deeds, because the statute only transfers the legal estate to the use, and says nothing of the title-deeds<sup>e</sup>; and it is shewn by Mr. Dixon that the earlier authorities support this proposition<sup>f</sup>. The only modern instance of its application, is in a case before Lord Kenyon in 1788<sup>g</sup>, where in an assignment of a mortgage, the usual clause granting the deeds was by some accident omitted. The transferee brought an action of trover against the assignor for detaining them; but the court held that he could not recover, because the defendant had as good a title to the deeds as himself;—an extraordinary position certainly, when it is recollected that the transferrer had assigned all his *estate and interest* in the premises to the plaintiff. What possible right of property could he then have in the deeds when he had received his mortgage money and retained no interest in the land?

The point, however, is of little practical importance, as in a conveyance to the common uses to bar dower, the purchaser is usually made the releasee himself; and if it be otherwise, the releasee is a mere trustee for the *cestui que use*, and is bound to deliver the deeds to the purchaser; indeed if the statute convey the legal estate to the use, the effect should be the same as if the releasee had executed an actual conveyance to the *cestui que use*, which would clearly carry the deeds.

The rule as laid down by Gibbs C. J. is, that a person having an interest in the land, has a right to the deeds, against a person having no such interest<sup>h</sup>. A contrary doctrine, viz. that of allowing an interest in the deeds to a person who has no interest in or lien upon the lands, is so absurd in itself and so incompatible with modern

notions, that it may be justly suspected whether a court of justice would, in the present day, allow of its application in practice; and though doubts may still be entertained whether the landowner can maintain an action of trover at law for his deeds, it is clear that he has an ample remedy in equity<sup>i</sup>.

Thus per Sir John Leach V. C. the possession of the title-deeds is incidental to the possession of the estate, but cannot be recovered with the estate at law. The court therefore will give the title-deeds to him who has at law recovered the possession of the estate; but its jurisdiction in this respect, is confined to the possessor of the estate. If the heir out of possession recovers the estate at law, then, but not till then, he may come here for the possession of the title-deeds. All the cases prove that<sup>j</sup>.—It is obvious, however, that the antient strict rule at law is relaxing, and that a more ameliorated and reasonable rule is in course of settlement. ‘It is a clear principle of law,’ said the court of Common Pleas in a late case, ‘that the muniments of an estate belong to the person who has the legal interest in it; but if that interest passes to another, he can no longer have a right to sue a bailee to whom he has delivered the deeds for a special purpose. Suppose the case of a conusor of a fine: the estate and muniments belong to the conusee after the levying of the fine: could the conusor after the fine had passed, maintain trover against the attorney for not re-delivering the title-deeds of the estate? When the right to the estate went, the right to the muniments went also<sup>k</sup>.’

Generally speaking, the tenant for life is entitled to the custody of the title-deeds<sup>l</sup>; for as he is to answer



the præcipe of strangers, it is reasonable that he should be furnished with the means of doing so. When an estate is settled on a person for life, who before had no interest in the property, there is little danger in allowing him to have the deeds; for he can only make a title through the settlement. But when a tenant in fee makes a settlement, and takes back an estate for life, there is considerable risk in allowing him to retain the deeds with the conveyance in fee to himself. The usual practice however is to allow him to retain the deeds without even requiring any memorandum to be endorsed on his conveyance of the material alteration that has been made in his estate by the settlement<sup>m</sup>: whether the trustees have a right to insist on such endorsement when they do not take the deeds, or whether they have a right either at law or in equity to the custody of the deeds, has not been distinctly settled; but more than one fraud has been committed in thus allowing the tenant for life to retain a conveyance of the fee to himself, especially if it be to uses to bar dower, as then he can deduce a good title to a mortgagee without shewing or noticing the settlement, or proving any jointure to have been settled on his wife;—he cannot make a *sale* without delivering possession, which would of course lead to a disclosure of the settlement. The general rule is not to take away the deeds from the tenant for life, and though in the case alluded to, the clause of all deeds may be introduced in the settlement, yet as the first use is to the settlor in fee, and the shifting use to him for life, his legal right to the custody of the deeds must, it is conceived, remain undoubted.

If an estate affected by one set of title-deeds be sold in lots, and no condition is inserted with respect to the

custody of the deeds, the vendor, I apprehend, is entitled to the custody of them if any lot remain unsold, however small in quantity that lot may be; but then, if there be no stipulation to the contrary, he must furnish the several purchasers with attested copies at his own expense, the purchasers being at the expense of the covenant to produce the deeds, as before mentioned. If all the lots are sold and there is no condition as to the custody of the deeds, they belong of right to the purchaser of the largest lot, who must covenant to produce the deeds to the other purchasers at their expense, but the vendor having omitted to stipulate as to attested copies, must himself be at the expense of them;—he cannot, I apprehend, insist on retaining the deeds when he disposes of all his interest in the land, though he may have previously sold a part and entered into a covenant to produce the deeds to that purchaser, nor could he require that the deeds be impounded in the hands of a third party, as his banker for instance, who has no interest in the property; and an express condition of sale to that effect appears to me so contrary to principle, that I think the court of chancery would, notwithstanding such a capricious and unwarrantable stipulation, direct the deeds to be delivered over to the purchaser of the largest lot. The court however never has exercised any corrective jurisdiction of this sort, but it has frequently gone to the very verge of reasonable construction.

If the vendor on a former occasion has sold any portion of the lands and retained the deeds, and now sells the residue; so that he has no pretence for retaining any evidences of the title himself, the present purchaser standing in the place of the vendor, has, it is

conceived, a better right to the custody of the deeds than the former purchaser, though his purchase concern the larger portion of the lands comprised in the deeds. Consequently the present purchaser could, I apprehend, resist specific performance of his contract, if the vendor claimed to retain the deeds to enable him to perform his covenant with the former purchaser, or to deliver them at once to that purchaser in satisfaction of his covenant. If he deliver over the deeds to the former purchaser, he must at all events, furnish the present purchaser with attested copies, and procure from that purchaser a covenant to produce the deeds, an expense which he would not have to incur by delivering the deeds to the present buyer. In embracing this alternative, he would deprive himself of the means of satisfying his covenant to produce the deeds to the former purchaser; but he may not unreasonably require of the present buyer a covenant to produce the deeds to the former purchaser when and as often as he himself is called on for that purpose. There can be little or no danger in the present purchaser giving that covenant, guarded as it is by a production to the former purchaser only, who has a common interest with himself in the deeds; and it must be the interest of the vendor rather to quiet than disturb the possession of those who have his covenant for quiet enjoyment 'notwithstanding any act hereafter to be done by him.' Whether the vendor could insist on retaining the deeds without a covenant of this kind from the present buyer, is another question. I should think the purchaser may legally resist such a demand; at the same time, he would, I think, run no risk in acceding to the request at the vendor's expense.

If the vendor on the former sale not only covenanted

to produce the deeds, but also stipulated that on a sale of the property retained by him, he would hand over the deeds to the former purchaser, (a stipulation purely voluntary on his part,) the former purchaser would then perhaps have a prior right to the deeds. The present purchaser could not, in that case, successfully contend against an actual covenant—his own right being at present founded on a contract *in fieri*, but he would have a right to attested copies at the vendor's expense, if there were no stipulation to the contrary; and as the deeds are now for the first time handed to the former purchaser, he may require the vendor to procure from that purchaser a covenant to produce the deeds to him. Whether that covenant should be entered into with the vendor or the present purchaser may be a question. The safest way would be to take the covenant from both, in order to ensure, if possible, its currency with the land.

During the pendency of the contract, the abstract belongs to the purchaser, and he may maintain an action of trover for it, if it has been once delivered to him<sup>o</sup>; but per Bayley J. if a purchaser of an estate refuses to complete his contract and pays nothing, he has no right to keep the abstract<sup>p</sup>. If his deposit be not returned, he may perhaps retain the abstract as a lien, but what value such a lien could be is not very obvious. He is not allowed to keep a copy of the abstract lest it should be used for mischievous purposes<sup>q</sup>, but as it creates no lien on the land it can be intrinsically of little value to any other person than the owner. Counsel's opinion on the title being paid for by the purchaser, belongs of right to him, and on delivering up the abstract, he may so completely erase it as to deprive the

vendor of all information it may contain<sup>r</sup>. On the other hand,—would he be justified, if his deposit were not forthcoming, in communicating a defect to the party entitled to take advantage of it? The threat of such a course may be tantamount to a lien, and the possibility of disclosure of a defect is one reason why the purchaser is not allowed to retain the abstract.

On the same principle the purchaser should not be allowed to retain the drafts of his conveyance. If he prepared them before the proper time, though in reasonable expectation that his requisitions would be answered or complied with, the expense should fall on himself; and the time could not have arrived when he was entitled to prepare the conveyance, until all objections have been answered; so that if he is not entitled to retain any copy of the abstract, (the recitals, parties, and parcels in the draft conveyance amounting to such,) he would in any event be bound to give up the drafts without payment of his solicitor's charges for their preparation, unless indeed they were proceeded with at the express request of the vendor.

## CHAPTER IV.

### OF THE TITLE TO DIFFERENT KINDS OF PROPERTY.

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|------------------------------|---------------------------------|
| 1. <i>Freehold.</i>          | 7. <i>Tithes and Advowsons.</i> |
| 2. <i>Leasehold.</i>         | 8. <i>Life Estates.</i>         |
| 3. <i>Copyhold.</i>          | 9. <i>Reversions.</i>           |
| 4. <i>Antient Demesne.</i>   | 10. <i>Colonial Property.</i>   |
| 5. <i>Gavelkind.</i>         | 11. <i>Ships and Shipping.</i>  |
| 6. <i>Equitable Estates.</i> | 12. <i>Personalty.</i>          |
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#### 1.---*Freehold.*

The evidence required on the sale or mortgage of freehold property, is the general subject of the present essay, and will not therefore require any specific notice here. It is the peculiarities arising from the consideration of different kinds of property, that attention is intended to be directed in this chapter. It will however be necessary to ask, whether the seller of freehold property is a debtor to the crown, or a surety for any crown debtor. Judgments, if any, against him are also encumbrances, and search should be made for them in the proper offices for the last ten or twenty years, though the vendor may himself have purchased the property only within a few months, unless there is a clearly existing outstanding term on which the purchaser can with safety rely for warding off these encumbrances, and he has neither direct or constructive notice of them.

A bare annuitant is not legally entitled to the custody of the title-deeds as against a person having an estate of freehold in the land under the same will or settlement; but life annuities are seldom granted without a term or some other specific legal interest in the land, and no annuitant would at this day consider himself safe without the deeds. If he leaves the deeds in the hands of the grantor, that enables him to commit a fraud, to which the annuitant thereby becomes a party; he would consequently be postponed to a subsequent purchaser or mortgagee without notice. If therefore the purchaser is to have the deeds, he need not trouble himself much about enrolled annuities; for having the deeds he will not be bound by the annuities, unless it can be proved that he had actual or constructive notice of their existence. If the seller be a trader amenable to the bankrupt laws, the purchaser must run the risk of *secret* acts of bankruptcy on which commissions issue within two months after his conveyance; if he has notice of an act of bankruptcy, *that* is a serious objection to the title. But a separate chapter being devoted to these subjects it will be unnecessary to pursue the consideration of them further here. We proceed therefore to,

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2.---*Leaseholds.*

The foundation of leasehold titles is the deed or will creating the term. Without the production of this document, the title cannot be treated as clearly marketable. Some gentlemen are understood to be of a contrary opinion, where long possession has continued under the term, and the deed or will creating it, is upwards of sixty years old. The recital of a lease in an

assignment sixty years of age, with consistent possession and an uninterrupted devolution of the title in the interval, are strong corroborative circumstances in proof of the existence of a lease. But the lease may have been made under a power, and there is no evidence by the recital of its due execution; other contingencies may be suggested, which would prevent the title being treated as clearly marketable, though it may be free from risk.

The validity of this deed or will depends on the legitimacy of the right of the grantor or deviser to make it. If nothing be stipulated to the contrary, it is generally understood, that the title of the lessor can be called for. This of course only applies to leases created within a period of sixty years. As to leases of greater antiquity, the fair presumption is, that the lessor had good right to grant the lease which has secured undisturbed possession for more than three score years. After such a confirmation, a requisition to produce the lessor's title would be viewed in practice as peculiarly captious and unsustainable.

As to leases of modern date, say between thirty and forty years old, it is laid down by Lord C. B. Richards in *Purvis v. Rayer*<sup>a</sup>, that if a contract be made for the sale of leasehold property unconditionally, without a stipulation in terms on the part of the vendor, that he means to sell his interest only in the residue of the term, and that he will not warrant his lessor's title, he is bound to shew to the satisfaction of the purchaser, that *his* lessor, or the original grantor of the term was entitled to grant the lease. He cannot otherwise oblige the purchaser to complete the contract made for the purchase of the premises.



The reporter adds in his marginal note, 'nor is there any thing in the circumstance of its being a very old lease, to make it an exception to this general rule of law.' The Chief Baron said, that the lease which was the subject of the contract was granted forty five years since; that certainly was a long time ago, but possession alone would not give a good title for the residue of the term; suppose the lease had been made by a tenant for life; the length of possession in that case could not be urged as evidence of a good title; the case was therefore like the common one of incumbents, who were entitled to tithes, receiving successively for a great number of years a sum of money as composition, in such a case the lapse of one hundred years, or one hundred and fifty years did not give an adverse right against the tithe owner; past enjoyment therefore gave no stability to a claim of future possession under the lease.—From which observations of the court, the general proposition of the reporter cannot be collected, and though it may be ultimately decided that a purchaser has a right to require the lessor's title whatever may be the antiquity of the lease, yet that point was not adjudged in the above mentioned case, and the practice is clearly against it, where upwards of sixty years undisturbed possession have sanctioned the title. Suppose the lessor had no right to grant the lease, is not his receipt of rent for sixty years a complete answer to the rightful owner? The case however is somewhat different from a freehold title; but it is trifling to say that sixty years uninterrupted enjoyment affords no presumption in favour of the validity of the lease, or that the great length of past possession of property within the statutes of limitation gives no assurance of future unmolested enjoyment.

Courts of law, however, have almost simultaneously

taken a different view of this question. On a general agreement for the sale and purchase of the lease of a public house, the purchaser refused to complete his contract without production of the lessor's title, which being refused, he commenced an action against the vendor for his deposit money. Abbott, Lord C. J.—I think this action is not maintainable. On looking to the agreement, I do not find a syllable to warrant the averment in the declaration, that the defendant undertook to make out a good title to the lease. Without such a stipulation, a party selling a lease is not bound to produce his landlord's title, a thing which in most cases would be utterly impossible. The cases the other way are only cases in equity, and although it may be true that a vendor, on a bill for specific performance, could not compel a purchaser to take a lease without shewing the lessor's title; still I shall hold, that in a court of law, the purchaser cannot recover his deposit on account of such title not being produced, unless the vendor has expressly contracted to furnish his lessor's title. The plaintiff must be called. A non-suit was accordingly entered <sup>b</sup>.

Questions of this kind are now usually forestalled, by a stipulation 'that the lessor's title shall not be required;'—upon which it has been recently adjudged, that if the purchaser can by other means produce the lessor's title, and it thereby appears that the lessor had no good right to grant the lease, still if he has purchased under a stipulation not to *require* the lessor's title, he shall not be at liberty to avail himself of an objection so obtained <sup>c</sup>. In conditions of sale prepared by the writer, he introduced this declaration that the lessor's title should not be required. The purchaser

took his abstract to a solicitor, who was the solicitor of the lessor; to whom it was perfectly familiar that the lessor was only tenant for life, having a power of leasing. Upon looking to the power it appeared that two witnesses were required, and the lease had only one. It was afterwards proved that the second witness (who was still living) had omitted to sign his name at the time but was now willing to do so. One of the Real Property Commissioners, being consulted on the subject, was of opinion that the defect was incurable by this means, and that the purchaser had a right to avail himself of the opportunity of inspecting the lessor's title, as he did so without requiring it of the vendor. It is merely necessary to add, that upon referring to the above decision, the objection was considered untenable. 'When a person agrees to accept an assignment without requiring the lessor's title, the fair construction,' said Mr. Jus. Bayley, 'is that he shall not be at liberty to raise *any* objection to the lessor's title.'<sup>d</sup>

It is quite clear that under leases granted by bishops and other ecclesiastical corporations enabled by statute, the lessor's title cannot be demanded; for it cannot be supposed that a bishop, a public functionary, would fraudulently put his episcopal seal to any public instrument, or that he has acted under a mistake and granted what did not belong to his See<sup>e</sup>.

Whether a person contracting for a lease is entitled to call upon the intended lessor to produce his title, is a question which has not been distinctly settled. Sir W. Grant said he should hesitate long before he decided, that the owner of real property, by contracting to grant a lease, becomes bound to shew the title to the

estate out of which it is granted<sup>f</sup>. In husbandry leases the tenant invariably accepts the demise without inquiring into the landlord's power to grant it; questions on that head he considers not only as querulous and presuming in the extreme, but as engendering a species of bad faith, which would certainly loose him the bargain. But though it be true, to use the words of Sir S. Romilly<sup>g</sup>, that no honest lessor would grant a lease without taking care that the lessee has the estate, yet there are landlords, who through inadvertency or uncontrollable circumstances, are found ready to grant leases without considering any interest but their own. It proves a source of great calamity to a tenant when he has brought his farm into a flourishing condition, to receive notice of a prior incumbrance, which may possibly be followed with a notice to quit or a rise of rent by the mortgagee, thereby making the lease virtually invalid. These considerations therefore render it highly essential in every individual taking a lease, to make all possible inquiries concerning his landlord, if there be the least reason to suspect that the farm is in mortgage. But whether he can insist on an inspection of the lessor's title, is a question not yet settled;—though if a purchaser from the lessee can demand that production, the lessee himself should be entitled to it from the lessor.

As to assignments of leasehold property, it is observable that acceptance of the deed is an acceptance of the lease and all its liabilities; an actual entry on the land is not necessary<sup>h</sup>; neither is it necessary that the assignee *sign* the deed to support an action of covenant against him<sup>i</sup>; and now it seems not requisite to prove that he accepted the assignment, the presumption being that the recipient of a benefit will not disclaim it until the

fact is shewn<sup>j</sup>.—‘I, A. B. do assign this lease to C. D.’ has been held to be a good assignment without a seal, but it must now be stamped<sup>k</sup>; and it seems that an agreement for an assignment may operate as an actual assignment<sup>l</sup>. But a parol lease even, must be assigned by writing<sup>m</sup>.—The assignee cannot legally refuse to give the assignor a *covenant* of indemnity against the ensuing rent and covenants in the original lease<sup>n</sup>. The value of such a covenant, must of course depend on the respectability of the assignee. It is with a view to bind the assignee to this covenant, that he is generally required to execute the assignment. But assignees of bankrupt assigning a lease are not entitled to a covenant of indemnity, either for themselves or the bankrupt, against the ensuing covenants with the lessor<sup>o</sup>.

The assignee of a lease, to shew his interest in the premises in a court of law, is required to prove the execution of the lease, and all the mesne assignments<sup>p</sup>; though if the assignment be endorsed on the lease, Lord Kenyon has said, it is sufficient to prove by the subscribing witness the execution of the assignment; for the assignment having adopted the original deed in all its parts, it becomes as one deed, and proof of part is sufficient for the whole<sup>q</sup>.—After thirty years possession the existence of a deed of assignment will be presumed, though there be no evidence that it actually existed, and none of its having been lost or destroyed<sup>r</sup>. These points however are not of primary importance to the Conveyancer, as he presumes that the lease and assignments are properly executed till the contrary is shewn.

A parol surrender cannot extinguish a lease in writ-

ing<sup>s</sup>, neither is the mere act of cancellation a surrender within the statute of frauds<sup>t</sup>, which requires such surrender to be by deed or note in writing, or by act or operation of law. Nor is the *recital* in a second lease, that that lease is granted in part consideration of the surrender of a prior lease of the same premises, a surrender by deed or note in writing of such prior lease, it not purporting in the terms of it, to be of itself a surrender or yielding up of the interest, though in some instances the acceptance of a second lease for part of the same term before demised, may be a surrender of such prior term by operation of law; and *this*, even though the second lease be voidable, if it be not merely void<sup>u</sup>.

Leases renewed by ecclesiastical corporations before the expiration of the existing lease usually contain a recital of the surrender of the former lease, which, though no evidence in court of an actual surrender within the statute of frauds, yet coupled with the grant of a new lease and the delivery up of the old one, is enough to warrant the presumption of a surrender either in terms or by operation of law. The principal object is to observe that the old lease is within three years of expiring; for the restraining statutes (18 Eliz. c. 11. and 13 Eliz. c. 10.) enact 'that all leases hereafter to be made by any of the said spiritual, ecclesiastical, or collegiate persons, or others, of any of their said ecclesiastical, spiritual, or collegiate lands, tenements, or hereditaments, whereof any former lease for years is in being, and not to be expired, surrendered, or ended within three years next after the making of any such new lease, shall be void.' On these acts it has lately been held that a lease by the warden and poor of

a hospital, under the corporation seal, made before the expiration of a former lease, to a lessee, who then had only a part interest in the first lease, but to whom the entire interest was assigned within three years afterwards, is binding upon the succeeding warden and poor of the hospital v.

As a lease for years is a chattel interest, it descends on the personal representative of the lessee, and a title cannot be made from a devisee or executor without production of the probate or from an administrator without production of letters of administration. It is also proper to observe that the probate or administration is granted by a court of competent jurisdiction. And if the legatee takes upon himself to assign the term without the concurrence of the executor expressed on the deed, it is necessary to shew that the executor has assented to the bequest. It is therefore proper and usual to make the executor a party to an assignment of a term by a legatee whenever it can be conveniently done; and an actual assignment from the executor to the devisee is frequently taken as the best means of preserving evidence of the executor's assent.

This previous assent is made necessary for the security of the executor, upon whom all personal property devolves, in trust to apply it, in the first instance, in the payment of debts; and until his assent is given, the legatee has only an inchoate property, and cannot enter upon the premises without being guilty of a trespass. But as this assent to a legacy is only requisite for the security of the executor, and to complete the title of the legatee, there is no specific form prescribed for declaring the assent. In general any expression or act

done by the executor, which shews his concurrence or agreement to the bequest, will be sufficient <sup>w</sup>, and it is said that 'a very small matter shall amount to an assent to a legacy, an assent being but a rightful act <sup>x</sup>. This assent, when once given, whether before probate or after, is evidence of assets, and an admission by the executor that the fund is adequate to the discharge of debts; it vests the interest at law absolutely and irrevocably in the legatee <sup>y</sup>, though he personally may still be liable to refund in a court of equity on the deficiency of other assets.—It is more than probable that the executor's assent to a bequest of a remote date, will be presumed. The exact period within which such a presumption will be made does not distinctly appear, but it is conceived, that it cannot strictly be made within twenty years, as debts on bond or judgment may continue in force for that time, but after that period a requisition to shew the executor's assent is never made, nor indeed is it commonly required after a period of ten or twelve years, unless there is reason to believe that the executorship is not wound up, or the trusts appear of long duration; then some enquiry on the subject seems requisite.

In treating with an executor or administrator, the purchaser has no occasion to look further than the clause appointing the executor and the jurisdiction of the court granting the probate or administration. Both have power to give a good and valid receipt for the purchase money and to assign the legal estate for the residue of the term; and the estate cannot be followed by the devisees although the sale be made for the executor's own debt, or the proceeds of the sale



never reach the legatee, unless the purchaser be in some way privy to an intended *devastavit* by the executor <sup>a</sup>. The title to leasehold estates is much simplified by this absolute power of disposition in the legal personal representative of the lessee.

In court, the probate only, and not the will, is admissible in evidence of the executor's title. The will itself whether proved or not is inadmissible, because originally the goods and chattels of all deceased persons devolved on the ecclesiastics, and their prior title is not to be defeated without some evidence of a grant by them of administration to the executor or administrator. In court, the original lease as also the mesne assignments will require the usual proof, but the observations previously made on the proof of deeds generally, apply here and need not be repeated. It is merely necessary to add that the production of an original lease for a long term of years, coupled with a possession for seventy years, has been held to be good presumptive evidence of the execution of all mesne assignments <sup>a</sup>.

In cases of intestacy many perplexing questions occur as to the proper parties to take out letters of administration, especially as to the shares of children who are dead, but this principally regards the executor or administrator in connection with the legatees or next of kin, and does not concern a purchaser or mortgagee, who in treating with the legal personal representative is entirely relieved from all risk about the application of his money. The distributive share of the next of kin, as appears by a late case is not assignable <sup>b</sup>; neither is the interest of

the next of kin in the intestate's leasehold property to be considered as conferring any vested equitable estate<sup>c</sup>, but these are points not embraced by the present essay.

With respect to Renewable leasehold property held under church leases, it is to be recollected that Bishops, Colleges and Ecclesiastical persons are not allowed to lease in *reversion* for obvious reasons. A renewed lease therefore from these bodies is objectionable, unless it appear that the former lease has expired, or is surrendered, or is within three years of its expiration<sup>d</sup>. Most leases of this kind are renewed before they expire by effluxion of time; and to render it certain that the new lease is not a grant in reversion, it is commonly expressed in the operative part of that lease, that it is granted in consideration of the surrender of the former lease, which is in fact delivered up to the lessors to be cancelled; *this* with the grant of a new term to take effect immediately must amount to a virtual, if not to an actual surrender of the former lease as noticed in a preceding page (149). The consequence however is, that the old lease being delivered up to the lessors, the lessee is at a loss how to carry back his title for a period of sixty years, which by the general rule he is bound to do in order to shew the purchaser that there is no outstanding trust or equity affecting the tenant-right of renewal.—The right of renewal is in equity considered the author or moving cause of every fresh lease, and any equity attaching on *that*, will attach on every succeeding lease;—if the lessors are *bound* to renew, that obligation confers an interest, which may be transferred or settled *at law*.

It may be asked, why carry back the title sixty years

when every equity not claimed within twenty years is considered as absolutely barred and destroyed? The answer to this pertinent enquiry is, that the bar by twenty years non-claim is in analogy to the statute of limitations, which deprives a party neglecting to exert his rights within that time of his possessory action, and as all remedies in equity are possessory as well as droitual, this rule is established as a convenient period beyond which it shall not be lawful for the rightful owner, sleeping thus long on his rights, to disturb the quiet possession which he has allowed another to usurp and retain for that length of time. But it is observable that in analogy to the statute at law, any slight acknowledgment of the outstanding right within twenty years by the party in possession, will in equity give the dormant owner another period of twenty years from the date of that acknowledgment, and the statutes do not affect persons under the legal disabilities of infancy, coverture, lunacy, duress, and absence from the kingdom. Besides a purchaser is not bound to take a title resting merely on the statutes of limitation; such a title is not considered marketable. It is therefore necessary to inspect the prior title of renewable leaseholds for such a period as will render it probable that no outstanding right or equity could exist in a person under any of the before mentioned disabilities prior to the commencement of the last twenty years. This is considered as not ascertainable under a period of fifty or sixty years; but even this period may be insufficient to render the point absolutely certain; for a woman having an equitable right to leasehold property may have been married forty-five years, and have died eighteen or nineteen years ago; her executor or administrator would now be entitled to that right, though more than sixty years may have

elapsed since it was in any way acknowledged or asserted. This indeed may occur under a freehold title, but it affords a reason why the title to renewable leaseholds should be traced back for a considerable period, and in analogy to freehold titles the rule is fixed by the common practice to a period of sixty years.

Regarding this requisition, the stewards of bishops and colleges usually register all surrendered leases, and will on application grant official copies for the use of the lessees and their assigns on payment of certain fees. They may also, I apprehend, be compelled by *subpœna duces tecum* to produce the original surrendered lease at any trial or hearing; but as between vendor and purchaser, these official copies examined and attested by the steward are all that the purchaser can require; but these he is entitled to at the vendor's expense, unless there be a stipulation to the contrary. Of course, neither the bishop nor the steward will covenant to produce these expired leases, nor could they be compelled to give such a covenant. The value of a cancelled or expired document is not very apparent;—the principal links in the title are wills, settlements, and assignments, these are in the custody of the parties themselves and will require the same attention as similar assurances of freehold lands, but the purchaser is entitled to some better evidence of the more recent leases than the mere recital of them in the deeds.

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3.---*Copyholds.*

The regular mode of deducing a title to copyhold estates, is by production and delivery of the several

copies of court roll, stamped as required by the several stamp acts. This is the best and primary evidence; for being properly stamped these copies are admissible in court without any proof of the stewards hand-writing signed at the foot <sup>e</sup>, or other proof as to the execution of the surrender by the vendor, except only that in ejectment, the court requires some evidence of identity as to the party admitted <sup>f</sup>; but this is never required by the Conveyancer.

The conveyance of a copyhold estate is quite different from the common conveyance of a freehold estate or of a freehold interest in copyhold property. The one is passed before an official witness who enrolls the transfer among the records of the manor, a copy of which he grants to the party, authenticated by his official signature at the foot as 'steward of the said manor.' This attests first, that the surrender was duly executed, and second, that admission has been formally granted upon it before the homage in open court; and if the steward will admit this against his lord under his own hand, it is not for the courts at Westminster to presume the contrary, and require actual proof of the due performance of the various stages of this compound assurance. The conveyance of a freehold estate on the contrary is a simple act executed in private, of which the courts of Westminster not unfairly require some further evidence than the mere writing itself—either by the attesting witnesses or by proof of their hand-writing.

It was in one case said, that if the admittance be of thirty years standing, then a copy of such admittance may be read in evidence without its being signed by the steward <sup>g</sup>. But in *Somerset v. France* <sup>h</sup>, a copy forty

years old was rejected because the steward's hand writing could not be proved. In modern admissions, some proof of the steward's signature to the copy may perhaps in strictness be required in court, but this is doubtful and is seldom enforced; for a copy authenticated by the steward is certainly different from an examined copy of a deed authenticated by a private person<sup>i</sup>. And *per* Holroyd J :—It is the duty of the steward of a manor to deliver to the tenants, as part of their title, copies of the court rolls; copies, therefore, are admitted in evidence upon the same principle as the chirograph of a fine, or the enrolment of a deed<sup>j</sup>.

Hence the official copy granted and signed by the steward is, if properly stamped, good evidence of the copyholder's title in all courts of law and equity. It must consequently be equally good evidence to the Conveyancer. So an examined copy of the court roll by any other person than the steward is good evidence of the copyholder's title, if the party making or examining it be in court to swear to its fidelity<sup>k</sup>. If then the *copy* be evidence, it must follow as a matter of course that the *original*, if produced, will be equally so<sup>l</sup>; and as the stamp is required by the acts to be impressed on the copy, the original may be given in evidence without shewing the payment of any stamp<sup>m</sup>.

The steward it is believed, is not bound to produce the rolls in court or elsewhere if he has tendered a legally authenticated copy under his own hand; and therefore if he be served with a *subpœna duces tecum*, he will not, I should think, be fined for non-attendance with the rolls upon shewing that he tendered or expressed his readiness to give true copies of the rolls regarding the

claimant's title, upon being furnished with particulars and paid his customary fees for such copies. It would be highly inconvenient if the steward were bound to travel about with the rolls from assize to assize or court to court at the will of the several copyholders. All that can be required of him is to permit the tenants of the manor to inspect the rolls at his office or at the court house as often as occasion shall require, and at their request to make copies;—and these copies he may certainly detain as a lien for his fees.—But though he cannot be compelled to attend with the rolls, he may voluntarily, at the request of any party, attend in court with the records for proof of the copyholder's title; and courts of law and equity will it seems admit this original evidence of the transfer of copyhold estates, without proof of the loss or destruction of the stamped copies granted on the first purchase.

But if an examined copy be tendered by the testimony of the examiner on oath, that I apprehend, is only secondary evidence, the stamped copy being the original and *that* by which the tenant holds his land. Evidence therefore of the loss or destruction of that copy should seem to be requisite before this secondary sworn copy can be admitted <sup>n</sup>.

The Conveyancer treats the stamped copy granted on the completion of the purchase as the only legitimate muniment of the copyholder's title. That copy may be deposited in the hands of a creditor and will in the hands of that party create a lien on the estate <sup>o</sup>. Without production therefore of that document or clear evidence of its loss or destruction, the title cannot be safely accepted; no inspection or production of the rolls

or any attested copy of the original copy, or of the rolls themselves, is admissible in the deduction of a title, without some clear and consistent account of the fate or custody of the stamped copy.

The only sufficient reason why this copy does not accompany the ownership of the lands, is that it relates jointly to other property, in which case the Conveyancer requires some written or verbal disclaimer on the part of the owner of that other property renouncing all lien upon or claim to the estate in contract, also a covenant to produce this original copy when required, and an attested copy thereof at the vendors expense; the preparation of the covenant however is usually at the purchaser's expense. The objection that the purchaser is not entitled to attested copies of deeds and documents of record does not seem to apply to this case, as the purchaser does not require an attested copy of the roll,—even admitting it to be a record,—but of the stamped copy.

If a copyhold estate be sold in lots, the original copies deducing the title are delivered to the largest purchaser or detained by the vendor retaining any of the property unsold, and the purchasers of the other lots are entitled to attested copies of these several master-copies at the vendor's expense, unless there be a stipulation to the contrary.—Whether the customary court as distinguished from the court baron is a court of record, does not distinctly appear. It does not follow, that because the court baron is not a court of record, the customary court is not to be treated, as to the copyhold tenants, as a court of that descrip-



tion. It is, in a popular sense, a record of their various titles, and there is a wide difference between the freemen in a court baron, who hold their lands independently of any act of court, and the copyholders in the customary court, who hold their lands by virtue of formal acts and entries of the court itself. Their title is dependant entirely on the records of the court, which should therefore, as to the copyhold lands, be treated as a court of record.

Decrees and judgments in other courts when once enrolled as of the record of those courts cannot be impeached even for error, the remedy being by appeal to courts above, and in this sense they are said to be an estoppel. Errors however in the enrolments of the court baron or customary court may be amended at any time<sup>p</sup>, and therefore they are said not to be of record, but though in this view they may not be strictly courts of record, it is open to contend, that they are such *public* repositories as between the tenants of the manor, that attested copies cannot be required of them, but as above hinted, an attested copy of the original stamped copy and of the rolls themselves are different requisitions, and the purchaser may call for the one without being entitled to the other.

But though the purchaser treats the original copies as the only evidences and muniments of the copyhold title, yet he is obliged to inspect the rolls themselves to see if there are any other copies than those abstracted; for it does not follow that because what is produced and abstracted may be sufficiently verified by comparison with the stamped copies, all the entries on the rolls are

brought forward. The purchaser cannot be assured that by the production of one or two incumbrances a third or fourth may not be suppressed. It is therefore incumbent on him to search the rolls not only in verification of the abstract, but to see that the documents produced comprise the whole title; for it has lately been held that the purchaser is bound by whatever appears on the rolls, and that he is to be considered as having notice thereof whether he inspects them or not—a decision at all events treating the rolls as a public and binding record of the facts there stated, which all persons dealing with the copyhold property are bound to notice. Sir W. Grant, M. R. seems to have doubted whether a purchaser of copyhold property must be presumed to have notice of every thing on the rolls<sup>q</sup>, and Mr. Sugden has reiterated that doubt<sup>r</sup>; but the case of *Pearce v. Newlyn* which decided that the purchaser was to be presumed conusant of all incumbrances appearing on the rolls<sup>s</sup>, has ever since been followed in practice, and is not now likely to be overruled on a mere *dictum*, which avers nothing but that it will not enter into the question<sup>t</sup>, and the doubt of a learned text writer with little of argument to support it<sup>u</sup>.

The copyholder has an interest in the rolls, as well as the lord. They contain evidence of his title, and the lord cannot deny a copyholder access to them<sup>v</sup>. With reference to the tenant, the lord is a trustee or guardian merely of the manorial muniments, and cannot lock up from his *cestui que trust*, evidence which would tend to increase his own rights. Every person, therefore, who has a *prima facie* title to a copyhold estate, is entitled to inspect the court rolls and customs of the manor at all seasonable times, and to take copies of

them as far as relates to the copyhold claimed or right affected. Nor is it necessary that a suit be depending to entitle the party to this right. The court of King's bench will interpose by mandamus upon a mere claim, without any affidavit that the party claiming has an actual interest in the premises. To require such suit would be extremely hard, for then the tenant would be obliged to commence an action blindfold, in complete uncertainty as to the extent of or probable title to the right claimed<sup>w</sup>. But the court of chancery, which always aims at substantial relief, will not send a case to a court of law, without being satisfied that the party applying has some title to the estate in question<sup>x</sup>.—If a tenant have no copy, or lose it, the roll is still sufficient evidence of his estate<sup>y</sup>, and if the roll be lost, he can make it good by proof<sup>z</sup>. And in certain cases, a surrender may be presumed or supplied where it does not appear on the rolls<sup>a</sup>. In a late case where a surrender of a copyhold estate was duly made and presented by the homage, but no entry of such surrender and presentment was made on the court rolls: the court of King's bench held that such surrender and presentment might be proved by the draft of an entry, produced from the muniments of the manor, and the parol testimony of the foreman of the homage-jury who made the presentment<sup>b</sup>.

The title to lands enfranchised is said to involve first, the copyhold or customary title, and second, the title to the freehold and seigniori. It is certainly true that to complete an enfranchisement the party receiving it should be actual tenant of the manor, and the party conferring it should be entitled to the seigniori in fee. So that there are two points to prove, first that the re-

leasee stands admitted tenant on the rolls, and second, that the releasor is lord of the manor having an indefeasible estate of fee simple therein, or a power to enfranchise derived from a person having such an absolute interest in the property. These points can be proved only by reference to the rolls and the lord's title-deeds. In negotiating an enfranchisement the title of both lord and copyholder should therefore be inspected. But the more appropriate question in this place is, whether both titles are requisite in proof of an enfranchisement which has taken place thirty or forty years ago. If the enfranchisement be complete, the releasee is no longer tenant of the manor but a frank-tenant, holding of the lord above, and as such, it should follow, that he has no right to inspect the court rolls, and if that be true he is precluded from making a title to the copyhold interest and cannot carry his title back for the period usually required in practice. It has been distinctly adjudged that a freeholder has no interest in the court rolls, and consequently no right to inspect them<sup>c</sup>.

But in this case the party claimed as an original freeholder and not as an enfranchised copyholder, who to a certain extent has still an interest in the rolls notwithstanding his manumission. His title depends on the fact that he stands admitted tenant at the time of the release, and as that fact, the very basis of his title, can only be proved by the court rolls or an authenticated copy, he is to that extent still a copyholder, and would, I think, be held entitled to inspect the rolls and to take copies of them in support and verification of his abstract for as long a period back as occasion may require. And this right, if it exist he certainly may enforce by man-

damus the same as any other tenant of the manor ;— and a mandamus lies without any suit depending <sup>d</sup>.

The copyholder on enfranchisement should preserve the evidences of his copyhold title or attested copies of them to meet this requisition. In practice, proof of the double title is always called for, and there is no legal impediment to the production of both titles at a certain expense ; a purchaser may perhaps have a right to require it, however antient the enfranchisement or satisfactory the possession ;—for the copyhold title governs the right, and if the party enfranchising had only a particular estate, those in remainder may on the determination of that estate, elect either to accept the enfranchisement or revive the copyhold tenure. In either case the right is with them, and the estate may be recovered thereunder by various means ; if they claim as copyholders they may prefer their plaint in the lord's court, or if they claim as freeholders they may on paying a proportion of the consideration given for the enfranchisement, file a bill in equity against the particular tenant, his heir, or the purchaser from him, for a conveyance as from any ordinary trustee.

It is therefore extremely essential to see that the copyhold title is of such a character as to preclude the possibility of any claim of this kind. An enfranchisement by a copyhold tenant in tail, will bar his issue, but not the remainder-men or reversioner. If however the copyholder be himself entitled to the immediate reversion or remainder in fee expectant on the estate tail, his title will be complete by the enfranchisement ; for the entail being barred there can be no other claimant <sup>e</sup>. It is only therefore where the enfranchisement

is effected by a tenant for life, that any doubt can be thrown on the title; and here, I apprehend, no length of time will operate to deprive the remainder-men of their right; for the lord may on application of the remainder-man, sue out his writ of *deceit*, (a writ not mentioned or included, as it is believed, in the statutes of limitation or non-claim of fines) and reclaim the copyhold lands, notwithstanding they may have been rendered frank-fee by one or more fines or recoveries in the courts at Westminster<sup>f</sup>. But it should be observed, that the title to enfranchised property can be considered complete only when the title to estates in fee in both tenures have been shewn; for till that be made appear no absolute extinguishment of the copyhold tenure or of the demisable quality of the land is effected<sup>g</sup>.

As to the freehold title, it is observable that a purchaser contracting for a freehold estate, is not bound to accept one of a copyhold tenure; and therefore the freehold title of the enfranchising lord will require inspection.—It does not appear to be absolutely essential that the deed of release should convey the freehold; a release of the seigniorship to the copyhold tenant would make the lands frank-fee, and the releasee would hold by free and common socage of the lord above, and so on to the lord paramount, or the king. The freehold is usually considered as residing in the lord, and the copyhold tenant is treated as a tenant at will, a tenancy which will not support a release, for the execution of the conveyance is a determination of the will on the part of the lord, as its acceptance would be on the part of the tenant<sup>h</sup>.—How then is the freehold to be transferred from the lord to the tenant without a formal conveyance working by transmutation of possession? This is reconcilable by

considering that the release is of the tenure not of the land, the copyholder has an estate of fee simple in the land, but only a tenancy at will in the *tenure*, the dominion or seignior in fee being in the lord. 'And two things are to be observed here,' says Lord Coke, 'first, that by a release of all the right in the land, the seignior is extinct, as well as by a release of all the right in the seignior; for the seignior issues out of the land. Second, that by a release of all right in the seignior or the land, the whole seignior is extinct without any words of inheritance!'

These observations are of course, addressed to the case where the copyholds are held in fee. In manors where they are held for life only, *there*, an actual conveyance and grant of the reversion is necessary, a mere release of the seignior would not operate as an enfranchisement further than the life or lives in the Copy.—And though an enfranchisement of a copyhold estate of inheritance may be supported by a mere release, yet it is always best and safest to take it by feoffment, by bargain and sale enrolled, or by lease and release.

The title of the lord to the seignior or manor is therefore as important as the title of the tenant to the copyhold, and more so, for the lord must be seised in fee or have a power emanating from a person seised of the manor in fee.—All incumbrances on the manor become, it is generally supposed, incumbrances on the enfranchised copyhold;—if the copyhold were conveyed to the lord, that would be clearly so, but the point is not so self-evident when the seignior is conveyed to the tenant; and there seems to be an impression, that there is a case deciding that incumbrances affecting the free-

hold tenure are not accelerated by enfranchisement, perhaps on the ground that the enfranchisement operates by way of enlargement of the copyhold interest, so that the possession is held under the copyhold title.—This case, however, has never been found ; and the better opinion, and that more consonant with principle is, that after enfranchisement the copyhold tenure is entirely annihilated<sup>1</sup>. The consequence is, that judgments, dowers, and incumbrances affecting the manor are usually treated as affecting the enfranchised land in the hands of the tenant ; to guard against which it has been recommended to create a term out of the copyhold interest prior to the enfranchisement, and to assign the term to a trustee in trust to attend and protect the inheritance.

The purchaser is therefore justified in requiring inspection of both titles, and upon the whole, it is apprehended, he may insist on seeing that his possession is free from interruption by persons claiming either under the freehold or copyhold tenures, in the same way as when a leaseholder purchases the reversion, a purchaser from him has a right to be assured that the titles of both leaseholder and freeholder are free from objection.

The next objects of enquiry after the title itself, are the customs of the manor, whether they entail any burdens on the tenant, such as heriots, mortuaries, or the like, and whether the descent is as at common law, and for what estate and how long the widow is entitled to free-bench, also whether the tenant is entitled to the timber and mines.

With respect to the identity of copyhold parcels, the



generality and vagueness of descriptions of copyhold property on the court rolls are so well known, that a vendor is not bound to shew how the description on the court roll is to be applied to the present state of the property, if he prove that the property has actually been enjoyed and passed under that description for upwards of sixty years<sup>k</sup>. If the copyhold tenant has so neglected the boundaries as to be unable to distinguish the copyhold lands from his freehold property when the lord wishes to ascertain the present annual value of the copyholds for the purpose of assessing his fine, he is bound to produce his own title-deeds to the freehold to shew the boundary of that property, or to pay the cost of a commission to ascertain the boundaries in the ordinary way<sup>l</sup>.

The much agitated question respecting the operation of a general devise on copyhold property where there is no surrender to the use of the will, has lately been decided against the prevailing opinion of the profession. In the case alluded to, there was a general devise of real estate, and the testator died possessed of freehold and copyhold lands; the will was attested by two witnesses only, so that the freeholds were not affected; but the copyholds were held to pass<sup>m</sup>. It is observable that the devise would have been wholly inoperative if the copyholds had been excluded. But the case did not turn on that point, it is clear if the will had been properly executed and there had been freeholds to satisfy the devise, the judgment of the court would have been the same. The opinion of the profession was certainly *contra*, and I had considerable doubt whether the act applied to voluntary and wilful omissions to surrender. The judgment of the court in the above case has

settled that point and decided in effect, that in order to exclude copyholds from a general devise, express prohibitory words must be used ; just reversing the position hitherto received. The object of the act as stated in the preamble is 'to do away with the inconvenience arising from the necessity of surrenders to will,' which this case has expounded, 'to do away with the necessity of surrenders altogether.' The contrary construction adopted by the profession was well presented to the court in argument ; which being disregarded I must consider this case as a binding authority until it is overruled, and there being more justice and certainly greater conformity to the intention in holding the copyholds to pass by the will, than to allow them to descend to the heir, I consider it improbable that the adjudication will be impeached. It had previously been held that the words 'real estate' will pass copyholds though there are freeholds to satisfy the devise<sup>n</sup>, so that it was no stretch to include the copyholds in the case alluded to. The only point therefore on the statute<sup>o</sup> now to be attended to, is to observe that the property is clearly copyhold and not customary freehold. Whether customary copyholds are within the act has been lately doubted ; but it appears to me clear that they are included.

In conclusion it may not be amiss to observe that Conveyancers do not usually, nor could they I apprehend as between vendor and purchaser, insist on the production of that strict proof which is required by courts of justice on a trial of *right*. The object of the Conveyancer is to see that there is not any material defect in the devolution of the title, if he can be assured of *that*, he does not treat slight blemishes in the evidence as of the same importance with actual defects. The rule is that

a purchaser is not compelled to take a title depending on a construction which is too doubtful to be settled without litigation<sup>p</sup>, and therefore if there be reasonable doubt his course is clear, but if the title be substantially good, trivial defects in the evidence are not usually regarded as sufficient to warrant a rejection of the title,—a course which a willing purchaser would seldom adopt if he could be apprised of the real sentiments of his Conveyancer on the value of the objections.

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4.---*Antient Demesne.*

The principal point in antient demesne titles is to observe that the fines and recoveries are levied and suffered in the court baron of the antient demesne manor. If a title is stated to be of this tenure and matters of record are found duly enrolled in a court purporting to be held in respect of the manor, it is not usual to require an extract from doomsday book deposited in the exchequer, or to make any further enquiries respecting the tenure than to observe that the manor is reputed to have been formerly holden of the king *in capite* in books which are open and extant to the public, such as the reports, and text books, and copies of doomsday book, and other public documents and records to be met with in some private and most public libraries. It is not usual to put the vendor to the expense of an official extract from the exchequer, unless to clear up some well founded doubt; and it may be questioned, whether a requisition of actual proof of the jurisdiction of the court to take fines and recoveries could be maintained on the sale and purchase of an

estate holden of the manor, when that jurisdiction never has been doubted, and no reason can be alleged in support of any suspicion of its competency.

Manors which were formerly held of the king *in capite* are still antient demesne, though now in the hands of subjects. It has occurred to the writer to call for earlier evidence of title than that detailed in the abstract, when it has appeared that a recovery eighty or ninety years old was suffered in a court purporting to be Antient Demesne, while a recovery of later date has been suffered in the court of common pleas at Westminster. Now as the jurisdiction of the court of antient demesne is not lost by fifty or sixty years non-user<sup>p</sup>; it was clear a good title could not be made without a release of the seignior. To reverse the last recovery would be to unsettle the property and at once reduce the title to a very precarious tenure. An enfranchisement from the lord of the manor will, in these cases be found the only safe and durable means of curing the perplexing questions which arise from any attempt on the tenant's part to bolster up the title; and this enfranchisement, it is believed, will be found in most cases easy to procure under the circumstances at a moderate expense. Few lords of manors can be so unreasonable as to sue for a forfeiture, and the utmost they can require is a valuable consideration, for the quit-rents and heriots which the property may be supposed to bear.

Tenure in antient demesne is now reduced to common socage by the statute of 12 Chas. ii. c. 24, and the principal incumbrance is a heriot on death or some similar outgoing. If any suspicion be entertained of

lands being antient demesne, reference will of course, be made to sources of information which are open to all; if the manor be found there recorded, the title cannot be treated as marketable, until an enfranchisement or an extinction of the manor is shewn.

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5.---*Gavelkind.*

If lands are situate in Kent, the presumption is that they are gavelkind <sup>a</sup>. It belongs to the vendor to shew that they are disgavelled if the descent is treated as at common law, as it does to shew that lands in other counties are of the tenure of gavelkind if they really are so <sup>r</sup>. But impropriate tithes of lands in Kent cannot be subject to the customs of the county, because the time of their becoming lay fees being ascertainable, the antiquity of the custom is destroyed <sup>s</sup>.

The descent in gavelkind is to the sons equally as coparceners <sup>t</sup>; some of the most complicated abstracts are the result of this partible quality. If the sons die, the daughters succeed in the usual way, and if one son or an only son dies leaving a daughter or daughters they succeed in preference to their aunts <sup>u</sup>; in short, the custom appears to extend to the remotest branch of collateral representation, which is contrary to the custom in borough English <sup>v</sup>. The descent in tail also, is according to the custom <sup>w</sup>, and herein agrees the custom of borough English <sup>x</sup>. The descent of trust estates also follows the custom <sup>y</sup>. Dower of gavelkind is of a moiety, but it is lost on marriage <sup>z</sup>. And it has lately been decided that the ordinary power of sale and exchange in a settlement of lands in Kent does not mean that the lands to be

purchased with the produce of the sale, or the lands to be received in exchange, shall be situate in the county of Kent<sup>a</sup>.

The customs of Kent are part of the common law; and these, as well as the customs in borough English, are noticed by the courts without being specially pleaded<sup>b</sup>. But the disgavelling statutes are all private acts, and not being printed, will require proof by an examined copy of the parliament roll. The statute 31 H. viii. c. 3, though printed in the statute book, is local and private in its nature, and contains no declaration at the end that it be deemed a public act. It must therefore be on a par with the other acts which are not printed: these are, one in 11 H. vii. for disgavelling the lands of Sir Richard Guldeford, another 15 H. viii. for the lands of Sir Henry Wyat; another 2 and 3 Ed. vi.; another 1 Eliz.; and another in the eighth year of the same reign, and the last in 21 Jac. i. The words of these statutes are very general and make the lands as if they had never been of the nature of gavelkind. Disgavelled lands therefore must originate in one of these statutes.

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6.---*Equitable Estates.*

In all investigations of title it is to be remembered that rights in equity are barred and entirely lost by twenty years negligence or acquiescence, and *that*, whether they are annexed to the legal interest or are existing in a separate shape. In the language of Sir Thomas Plumer, the lapse of twenty years affords a substantive, insuperable plea in bar; it is the fixed limit to the remedy, the *tempus constitutum*; one day beyond

is as much too late as one hundred years. This is the peremptory inflexible rule at law, fixed by positive statutes, if there has been adverse possession and no disability or fraud. No plea of poverty, ignorance, or mistake, can be of any avail. However clear and indisputable the title, if the merits could be enquired into, however demonstratively tortious and wrongful the adverse possession, the fact of such possession, and the time preclude all investigation of the title. It is a decisive answer to the claimant that he comes too late. That alone is the bar. His title remains, but his remedy is lost, and time having once begun to run, continues to run on, though subsequent disabilities intervene<sup>c</sup>. So *per* Lord Eldon:—the mortgagee is not under any obligation to keep alive the equity of redemption for the mortgagor. He is a trustee for 19 years 364 days 11 hours and 59 minutes, but at the end of the 365th day he is no longer a trustee if there has been no acknowledgment and no account; courts of equity say that parties must come in reasonable time, the peace of mankind and the security of property require it<sup>d</sup>.

The consequence of this doctrine is, that if A. be trustee for B., and they both suffer C. to remain in undisturbed possession of the property for twenty years, B.'s remedy in equity to compel a conveyance of the legal estate from A. is for ever lost to him and his heirs. A. however may make a voluntary conveyance to B. though he could not be compelled to do so, and then B. having the legal and equitable estate may pursue his legal remedy by real action. And the trustee may, I apprehend, commence and prosecute a real action against C., and having recovered possession may convey to B.

though if B. has lost all remedy in equity, B. could not compel A. to reconvey the estate to himself, nor indeed could he compel his trustee to proceed at law for the recovery of the property. To whom then does the estate belong after it has thus been recovered by the trustee supposing he should refuse to answer B.'s gratuitous call for a conveyance?

Before this question can be answered, it is necessary to advert to the situation of C. He, we will suppose, has been in undisturbed possession for twenty years without having had any legal or equitable right or title to the property originally. The moment this period of twenty years elapsed, B. lost all *remedy* in equity, though if he had been, or perhaps be now entitled to the legal estate, he would not be barred of his *remedy* at law. But though B. loses his equitable *remedy*, he does not entirely lose his equitable *estate*, the right to *that* remains, but his remedy for its recovery is gone; which shews that if he can recover the right without resort to the remedy, it will when obtained be acknowledged as heretofore, and then the remedy itself will be restored. But the question now is, whether the loss of B. is the gain of C. As between B. and C. the latter must have the preferable right in equity to call on A. for a conveyance of the legal estate, for B. has no remedy at all, and C. by his adverse possession has acquired even at law a *right* to that possession and can therefore in virtue of that vested and acknowledged right call upon B. to convey the legal estate to himself or trustee. What defence could A. make to a bill preferred against him by C. in the court of chancery? By his own acknowledgment he is a trustee, or if he claims any right by the deed conveying the estate to him he must set out the deed, by which



it will appear that he is a trustee for another and has no equitable right or interest in himself; he is estopped by acceptance of the trust from claiming any beneficial interest in the land, and can make no title in chancery to the property himself; he is therefore a trustee for some person,—either B. or C. He acknowledges B. but B. disclaims by his acts of negligence all remedy to this his acknowledged right, then C. (who has not deprived himself of his remedy) should be entitled to the full benefit of it, and as there is no one legally to oppose his claim, he must recover on his preferable title. By this means he will acquire in twenty years, a good and marketable title to the estate, which, if the interests of A. and B. had been blended and united in one owner at the commencement of C.'s possession, he could not have obtained under sixty years.

The consequence is that a title thus circumstanced must against B. be considered marketable on a twenty years possession, but still C. must deduce a title to the legal estate for sixty years previous to the sale, for there may be legal rights existing prior to the estate and interest of A. and B. which remain unbarred or outstanding; and the purchaser has a right to be assured that no such outstanding or dormant rights exist, by seeing a clear title commencing from the ordinary period; and *this*, C. who has now recovered the legal estate from A. can do by the prior title-deeds, for having recovered the legal estate he is in equity clearly entitled to the deeds.

One important point however still remains to be considered. We have supposed C. to have been in undisturbed possession for twenty years, can this possession

be considered as adverse, if C. has direct notice of B.'s right? I apprehend it must be so considered if C. has not during that interval acknowledged B.'s interest in any way; any slight acknowledgment would be sufficient for such a purpose; a letter to a friend wherein the right of the negligent party is treated as existing; a recital in a deed acknowledging or referring to it as an existing right, or an answer in chancery setting forth B.'s interest, would be sufficient to shew that the possession was not adverse, but it lies upon B. to establish this point. If then the possession be adverse, I apprehend the fact of notice will not be enough to convert C. into a trustee; though he take a conveyance from the acknowledged trustee A.—The adverse possession is in this case the criterion of the right, and not the notice; for otherwise C. taking the legal estate from the trustee with direct notice, would himself become a trustee without any power in his *cestui que trust* to compel a conveyance or perception of the rents and profits, in short, he would become trustee in name without any one duty of a trustee to perform,—an anomaly too absurd to be tolerated.

When therefore requisitions are made respecting the births, burials, and legitimacy of persons, who, twenty years before, had only equitable interests in the premises, it should be first considered whether these persons can by any possibility now have any remedy against the estate, and it is believed that many objections may be answered by a reference to this recently well settled doctrine.

Another important feature in equitable estates is that they are created and maintained solely and only by a

valuable consideration; the moment that consideration is withdrawn they become voluntary or secondary equities, and as such are disregarded in chancery; the trustee of an equitable interest has neither right nor remedy, the whole benefit resides in the party for whom he stands entrusted. Hence it follows that on the discharge of an equitable mortgage in fee or for years, no reconveyance, assignment, or surrender is strictly necessary. The purpose being satisfied, the right is extinct. Of such interests it may be said, *cessante causa cessat effectus*. But the estate of a legal mortgagee outlives the purpose of its creation, because that purpose is not an object of legal cognizance. The same train of reasoning, says an eloquent modern writer, conducts us to the conclusion, that on the death of an equitable mortgagee in fee, no interest devolves upon his real representative. In equity a mortgage, whether in fee or for years, is only a pledge, to the benefit of which the personal representative is entitled. As the executor of a legal mortgagee in fee has a right to call for the legal estate from the heir, so the executor of an equitable mortgagee in fee has a right to call for the legal estate directly from the mortgagor or his trustee. The mortgage must be made to the executor, and not to the heir. The heir has therefore no equity, and having none can have no interest in a subject wholly equitable<sup>e</sup>.

The owner of equitable interests not having notice of prior or succeeding equities, may, by obtaining a conveyance of the legal estate, acquire a priority over all other claimants having a similar description of interest. It is on this account that equitable titles are not considered marketable; for a subsequent incumbrancer even, may by getting in the legal estate acquire a priority

over the purchaser. But if the seller has an equitable interest with uncontrollable power over the legal estate, so that he can by the same conveyance transfer the entire right to the purchaser, his title cannot be pronounced unmarketable. Whether he can be compelled to procure a conveyance of the legal estate to himself in order to make his covenants run with the land, is a question which remains to be decided. Such a requisition, if the vendor be a married man, would put him to the expense of a fine. The anxiety to obtain a chain of legal covenants is of modern origin, and the practice of ages is against the requisition. The extra length of the conveyance occasioned by the concurrence of a trustee in whom the legal estate is outstanding, depends on the circumstance, whether the purchaser considers it necessary to shew by a long train of recitals how the legal and equitable estates became severed, which being introduced purely for his own satisfaction, cannot be attributed to the vendor.

When an estate is sold under a decree, the court does not warrant the title, but it directs all proper parties to join, and if there be any question on that head, it is referred to a Master to ascertain who are proper parties. The application of the money however is taken entirely under the direction of the court, and payment into the bank in the name of the accountant-general to the credit of the cause is a good discharge. But the purchaser under a decree will be compelled to accept an equitable title<sup>f</sup>, yet if he sell the estate again, the court will not enforce a specific performance against the second purchaser<sup>g</sup>. A purchaser however, where the estate is not sold by the court, does not lose his right to a legal and equitable title merely by agreeing to go before the Master

on a reference in a suit in court for the administration of assets <sup>b</sup>.

When the contract is for an equitable title or the purchaser agrees to accept such a title, very effective protection is obtained by giving notice of the purchase to the person having the legal estate. On this principle it has been contended, that the owner of an equitable interest by giving notice to the owner of the legal estate, may entitle himself to a priority over a former purchaser of an equitable interest in the same land who has omitted to give such notice, and of whose interest the purchaser himself had, at the time of *his* purchase, no notice <sup>i</sup>. Eminent lawyers however are understood not to be satisfied with the grounds on which this doctrine rests. The inadequacy and inequality if its operation is thus illustrated by the Real Property Commissioners :— The purchaser of an equitable or a secondary interest may not know who holds the legal estate, or may not have access to him, or such person may be incapable of receiving the notice, or other circumstances may afford a just excuse for not giving the notice. The legal estate may be held by many persons, or split into various interests. The person receiving the notice, if it be not endorsed on the deed under which he holds (which endorsement cannot always be procured), may mislay the notice, and forget it ; the legal estate may be transferred or transmitted without the notice ; there may ultimately be disputes, whether the notice was given, or given to the right person ; or as to priority between several parties who may have given like notices ; or whether the notice, although rightly given, ought under various circumstances, to have effect against prior parties, or against subsequent parties whom it may not have

reached. Owing to the peril known to attend securities on equitable interest, trustees are well understood not to be at liberty to advance money upon them, and practically, such interests lie under great disadvantages as to transfer<sup>l</sup>.

Still if an equitable title is accepted, it should be remembered, that notice when given to a trustee, affords greater protection than when given to a mortgagee or other person beneficially entitled to a prior estate. A trustee who has received such notice, is guilty of a breach of trust, and therefore personally responsible, if he wilfully transfer the estate otherwise than according to the direction of the person entitled to the equitable estate, but it is considered that a mortgagee is entitled to obtain his money whenever he may be able, and therefore is justified in transferring his security to a third or subsequent incumbrancer, after having received notice of the second mortgage. The owner of a prior estate is entitled to sell and convey it, and is not answerable if he neglect to transmit to the purchaser any notice he may have received; and therefore such estate may be obtained by a subsequent incumbrancer, or the owner of a subsequent equity.

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7.---*Church Property and Tithes.*

By induction the clerk becomes seised of the temporalities of his benefice<sup>k</sup>. This investiture therefore is the foundation of the rector's title. At law if the rector's right be disputed, it is necessary to give strict formal proof of his presentation, institution, and induction<sup>l</sup>; but in equity this does not appear to be requisite<sup>m</sup>;

and to the Conveyancer it is rendered comparatively unimportant by the late adjudication in the King's bench, where the question respecting the incumbent's power to mortgage or charge his benefice is distinctly negatived. It was there holden that a demise by a parson of his benefice for securing an annuity is absolutely null and void, not only as against the successor but as against the grantor himself, for that it is in substance a charging of the benefice within the statute of 13 Eliz. c. 20, which, as far as relates to chargings of benefices, is now in force, having been revived by the statute 57 Geo. iii. c. 99, (1817) <sup>n</sup>.

A lease of a benefice is good, provided it be not a subterfuge for a charge<sup>o</sup>, but an assignment of the rent as a security for a debt would doubtless be exposed to the abrogating clause of the above mentioned statute. It is clear both on principle and authority, that a lessee of tithes cannot sue for them without making his lessor a party <sup>p</sup>.

In a title to impropriate tithes, the Conveyancer always requires evidence of the grant from the crown which converts the ecclesiastical benefice into a temporal inheritance. With that he is satisfied, if the title commence sixty years back and is regularly deduced from thence to the present time. It is however worthy of remark, that though tithes are by their impropriation rendered temporal inheritances, yet they do not altogether lose their original character, for though they are in lay hands, no time is allowed to run against a demand for them<sup>q</sup>. Yet a lay impropriator may alien and charge his tithes; for they are not within the before mentioned statute of Elizabeth. That statute relates exclu-

sively to ecclesiastical benefices<sup>r</sup>. Another reason why the Conveyancer requires proof of the original grant, is to see that it contains no reservation to, or leaves no remainder in the crown, for it should be observed that a reversion in the crown on a grant for services performed, not only prevents the tenant in tail from barring his issue, but saves the remainder also<sup>s</sup>.

The proper place to search for the original grant is the augmentation office, which, though long since abolished, still contains all the records<sup>t</sup>. If the grant from the crown cannot be clearly made out, it may be shewn that the tithes originally belonged to a dissolved monastery, for in that way only could the crown's title have accrued<sup>u</sup>. An impropriation has been presumed on 600 years enjoyment<sup>v</sup>; and in a late case it was said that though mere non-payment of tithes, for however long a period, will not be evidence of a grant, yet a layman's adverse enjoyment for a long series of years will justify a jury in presuming a legal grant<sup>w</sup>. But a book found in the herald's office, purporting to be an account of the possessions of a monastery, is not admissible evidence of that fact<sup>x</sup>.

As to the subsequent title, it is observable that as tithes are incorporeal hereditaments they lie in grant and cannot pass without deed<sup>y</sup>. They are subject to dower and other incumbrances which affect real estate, and the evidence requisite to support a title to ordinary freeholds is as applicable to a title to tithes as to any other estate of inheritance.

To prove lands tithe-free, it should be shewn that they originally belonged to one of the dissolved monasteries,



which, provided the lands have ever since been held discharged of tithes, will raise the presumption that they were in some way discharged by the abbots before the dissolution, though the exact manner of the discharge cannot now be made out. In this case it is sufficient to allege that the lands were part of the possessions of the monasteries, and were at the time of the dissolution discharged from the payment of tithes, by composition, prescription, or in some other lawful way<sup>z</sup>. But evidence that lands have never within the memory of any living witness, paid tithes; is not a sufficient title to an exemption from them<sup>a</sup>. To prove an exemption *in non decimando*, it must be shewn that the religious house was exempt from tithes, as well as that the lands belonged to that house<sup>b</sup>.

If an estate be sold tithe-free, the right to the tithe is material to the enjoyment of the land, and a purchaser will not be compelled to complete his contract with a compensation; but this rule admits of exception where circumstances manifest that the right to the tithe did not form an inducement to the contract<sup>c</sup>. And it seems that the question whether an estate be tithe-free is not a question of title, for the Master will not look into it without an express direction<sup>d</sup>.

As to an advowson, if it be appendant to a manor, the title to the manor carried back for a period of sixty years will be sufficient<sup>e</sup>, but if the advowson be in gross, the title from the period of its separation may be required. The statutes of limitation as to advowsons, whether in the hands of lay or ecclesiastical proprietors, have been repealed generally<sup>f</sup>; consequently the rule as to carrying back the title sixty years, does not apply to advowsons

which are independant of property within those statutes, such as advowsons in gross, but the title to these is seldom required for a further period than is sufficient to raise a *prima facie* title to the right. This necessarily must embrace a much longer period than sixty years, as one incumbent may occupy the benefice the greater portion of that time. An abstract of title to an advowson in gross consists of a statement of the presentations, the dates and names of the patrons, and clerks, and the devolution of title from patron to patron.

If a vacancy occur in the lifetime of the testator the right of presentation belongs to the executor not to the heir, yet the executor can make no profit of it during the vacancy<sup>g</sup>. The reason assigned for its devolving on the executor is, that it is a chattel vested and severed<sup>h</sup>. An advowson is assets in the hands of the heir and the right of next presentation to a church, when it falls is assets in the hands of the executor, both these are allowed to be sold, but a void presentation cannot be made the subject of contract<sup>i</sup>.

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8.---*Of the Title to Life Estates.*

An estate for life being an estate of freehold can pass by livery of seisin only or its equivalent. The conveyance most usually adopted for this purpose, is a lease and release whether the interest be legal or equitable. If the tenant for life has the deeds,—is he justified in handing them over to the purchaser? I should think he is bound on giving up all interest in the land, to deliver over the title-deeds to the party substituted in his place, and who now in fact becomes the beneficial tenant of

the particular estate. The purchaser cannot of course retain the deeds against the remainder-man on the determination of the life interest, unless he has a claim of some sort against him. Would a simple contract debt be enough to warrant such a retention when the deeds came into his hands entirely *diverso intuitu*?—The purchaser of a life estate has such an interest in the life, that he may and generally does insure the return of his purchase money on the death of the particular tenant.

No person would be rash enough to buy a life interest without some evidence of the existence of the life. The *value* of the life is a point on which it is presumed the purchaser has satisfied himself before the abstract is laid before the Conveyancer. A title to a life interest can scarcely be considered marketable without proof that the author of it had an unincumbered estate in fee simple, which can only be shewn by a deduction of *his* title for a period of sixty years back. It is not however *usual* on the purchase of a temporary benefit to inspect the title to the fee; and if such inspection be deemed essential, it can only be requisite to see that there is a *prima facie* title without requiring all the strict proof which is called for on an entire change of ownership. On the purchase of the widow's estate in dower, or the husband's title by curtesy, the requisites to those legal incidents should of course, be required and proved.

Whether on the purchase of a lease for lives, the lessor's title can be demanded, has been noticed in the section on the title to leasehold estates, and in this respect the character of the term can make no difference.

A tenant for life is not bound to renew<sup>j</sup>; neither therefore should a purchaser from him<sup>k</sup>. But if he does renew, he is not bound to pay the whole fines and fees; he may recover a proportion of them from the remainder-man<sup>l</sup>.

Estates for life may be incumbered to the extent of the interest in the same manner as estates in fee. Similar enquiries should therefore be made respecting crown debts, judgments, and incumbrances as on the purchase of a fee simple estate. In a late case<sup>m</sup> it was a question how far equitable estates for life were subject to judgments, and some curious distinctions were wrought, which will be noticed in due order in the chapter on 'Incumbrances.' The purchaser must also calculate upon some outgoing for dilapidations, for though the remainder-man's first remedy is against the personal representatives of the tenant for life<sup>n</sup>, they could undoubtedly recover a proportion if not the whole amount of damage sustained from the purchaser. It has been held that a tenant for life of a moiety of an estate in possession, is bound to keep the whole in repair, and as such is answerable to the remainder-man for dilapidations<sup>o</sup>.

A tenant for life without impeachment of waste has an absolute property in the timber when cut down<sup>p</sup>, and the remainder-man cannot prevent him from felling it when ripe. This right he may transfer to a purchaser<sup>q</sup>; but it should be remembered that the tenant for life though without impeachment for waste, is not, on the sale or exchange of the estate under a power, entitled to the price at which the timber is valued. A case of great hardship has lately been reported on this sub-

ject<sup>r</sup>. But a tenant for life having a power cannot after a sale exercise it to the prejudice of a purchaser<sup>s</sup>.

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9.---*Of Titles to Reversions.*

The title to a reversion in fee requires to be carried back for the same period as an estate in possession. The evidences of title to the fee are the same whether the immediate enjoyment of the land be postponed or whether the possession be entered upon immediately. The difficulties in the way of a sale of the reversion are, the want of the deeds, the possibility of a former sale or incumbrance, and the liability to review on any reasonable suggestion of inadequacy of price. The deeds are usually in the hands of the tenant for life or the trustees of the will or settlement creating the reversion. In either case the reversioner may require production of the deeds, though he is not a party to them<sup>t</sup>. In equity, he may insist on the deeds being deposited for safe custody without any evidence of spoliation by the tenant for life, but the court never takes the deeds out of the hands of the father, tenant for life, at the suit of his son, tenant in tail, even if there be some evidence of spoliation by the father<sup>u</sup>; but if any serious destruction be committed in the evidences of title, an action at law is maintainable by the reversioner<sup>v</sup>; and an injunction may be obtained in equity on a fair case shewing a determination or disposition to commit a spoliation<sup>w</sup>.

The reversioner therefore can at all times procure access to the deeds, but whether he can obtain, or is himself entitled to attested copies of them is another question. An undeniable right to inspect should seem

to confer a right to copy, and the tenant for life could not, I apprehend, refuse copies at the reversioner's expense, but I do not recollect a case where such a question has been debated. It is a desirable object to procure an endorsement of the purchase on the deed or will creating the reversion. Notice to the trustees, to the tenant for life, and to the holder of the deeds, if they are in the hands of a third person, should invariably be given of the sale and conveyance or mortgage of the reversion, and enquiry should be made whether those respective persons have notice of any prior sale or incumbrance, and it should at the same time be stated that these enquiries are made on behalf of a proposed lender or buyer. But trustees, though thus made trustees for the purchaser, and consequently answerable for any *wilful* default, would not, I apprehend, be responsible for any inadvertence or want of recollection in regard to a former notice. The more permanent safeguard therefore against a surprise on this head is a written memorandum of the sale or mortgage endorsed on the deed or will creating the reversion, but this cannot always be obtained, and the purchaser could not by the usual practice insist on it; he is entitled to give notice and enquire as to former incumbrances, but as to copies of the deeds or a written memorandum to be endorsed on any of them, his right, to say the least of it may be questioned.

The rule that the purchaser of a reversion must be prepared to shew that he has given a full price for it has been so long settled that it can now only be altered by a court of appeal<sup>2</sup>; and this rule applies as well to persons of mature years as to young and expectant heirs. The sale of a reversion is not absolutely void but only

voidable in case the court shall be of opinion that an inadequate price has been given for it. As this review seldom takes place till the reversion has fallen in and its value is ascertained, the advantage is obviously on the side of the seller; for though the price is calculated on the actual value at the time of sale, yet it is difficult to form the true estimate of a thing surrounded with doubt and uncertainty when the contingencies are removed. But the court never allows the seller to vacate the bargain except on the terms of allowing the purchaser his consideration money with interest and costs <sup>v</sup>. And when the sale is by public auction the inference is that a fair market price has been given <sup>z</sup>. The *onus* is then thrown on the vendor to shew that some fraud was committed in the advertisement or management of the auction, or that the sale was publicly conducted without a reserved bidding, or in short, that the full value was not given or not actually paid. A peremptory sale obliges the vendor to accept whatever is offered, however small; the want of prudence in such a course, again shifts the *onus*, and obliges the purchaser to shew that he has not taken advantage of the indiscreet conduct of the necessitous party to the bargain <sup>a</sup>. Hence the purchase of a reversion by private contract is objectionable, as it exposes the purchaser to the expense of a review in a court of equity as well as to the natural anxiety attendant on the progress and result of that review <sup>b</sup>.

The court will not readily enter into the value of property dependant on the contingency of a death without issue, but where it appeared that the treaty was entered into on the basis of considering the contingency as half the value of the reversion, an enquiry was directed as to the real value, at one half of which, the con-

tingency was directed to be rated<sup>c</sup>. A consideration one third less than the valuation has been held not to be inadequate<sup>d</sup>. But where a reversion expectant on a life aged 83 was sold for £800, to be paid on the death of the tenant for life, and £200 part of the £800 was advanced to the seller at 5 per cent in the interim; such an obviously hard bargain was properly set aside<sup>e</sup>.

To return from this brief digression, it is observable that judgments against the several persons through whom the reversion has passed will become consecutively liens on the property when the reversion falls into possession<sup>f</sup>; and leases made by tenants for life under and pursuant to powers will be binding on the reversioner. So also will leases made or agreed to be made by the reversioner himself<sup>g</sup>. It may also be proper to remind the student that a reversion cannot be granted for an estate of freehold to commence *in futuro* any more than an estate in possession. The usual mode of conveying a reversion is by lease and release; but a simple grant is the more scientific means of passing this description of property where a prior estate clearly exists. If the tenant for life buys the reversion it is desirable to keep them distinct for many reasons, the conveyance should therefore be and generally is in such a case to a trustee.

Titles depending on the destruction of contingent remainders are open to much objection. Courts of equity will not compel a purchaser to take a title recently manufactured in this way<sup>h</sup>. The feoffment or forfeiture may be incomplete, and a title founded in wrong never can be treated as clearly marketable, unless the time is long gone by when the contingent remainder-man may have



exerted his legal remedy. It is now settled that contingent and executory interests may be bound by estoppel till the event happens, and on the happening of the event that the same means may operate by conveyance so as to pass the interest then arising<sup>i</sup>, and that a lease and release is as good an estoppel and conveyance for this purpose as a fine<sup>j</sup>. The consequence is that if all parties join in the conveyance of an executory devise or contingent interest, a good title may be made, and they may divide the purchase money among themselves according to the value of their several interests, if they can agree upon such valuation, without waiting for the happening of the contingency.

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10.---*Of Colonial Property.*

All deeds and assurances of lands in the West Indies are required to be registered to give them validity.—Deeds executed in the Island may be acknowledged before the registrar within thirty days after the date; those executed in Grenada, the Grenadines, Tobago, Dominica and Barbadoes, within three months; those in the Leeward Islands in four months; and those in Great Britain, Ireland, or America in the space of twelve months: and all deeds acknowledged within these prescribed periods are valid and effectual from the day of the date of the instrument, but those acknowledged after such periods, are as against subsequent purchasers, valid only from the time of the acknowledgment, but as between parties to the deeds, they are effectual from the day of the date, whenever recorded<sup>k</sup>.—This reference to an available register has the effect of simplifying the title and of reducing the evidence to

one focus, for what is not recorded may to a certain extent be disregarded. I am not aware whether the doctrine of notice has been introduced into the colonies, but many cases of inconvenience and double dealing present themselves by allowing deeds executed out of the colony to be valid prior to registration.

Copies of all deeds, attested by the Registrar as true copies of the record in his office, are as good evidence as the original deed; and the attestation of the registrar is sufficient proof of the execution of the original. Hence it appears, that the register book is the record, and therefore a copy from *that* is not a copy of a copy, which would not be evidence. Copies of deeds and wills recorded in the secretary's office before the date of the registry act, attested by the secretary, are admitted as sufficiently proved and as legal evidence when the deeds themselves might be admitted<sup>1</sup>.

The statute 59 Geo. iii. c. 120, requires copies of the return of slaves made in the colonies to be recorded in an office in Great Britain. And by the 5 Geo. iv. c. 113, s. 37, (which consolidates all the other acts on the subject of slaves), it is enacted that in all conveyances, mortgages, and charges of slaves, the names and descriptions of the slaves, according to the latest registration in Great Britain, shall be set forth either in the body of the deed, or in a schedule thereto, and all deeds which do not comply with the provisions of this act are declared null and void. It is therefore essential to see that these provisions have been complied with.

Wills in the West Indies require the same formalities as in England. In short, all the statutes up to 1763,

except such as are of a local or political nature are considered binding on the colonies<sup>m</sup>. Wills are proved by affidavit made before the Chancellor, as ordinary, by one of the subscribing witnesses, who attest the due execution of the instrument, and the disposing mind of the testator: if the witnesses are dead, proof of the hand-writing of the testator is admitted by other means. Upon this, letters testamentary are issued by the register, and the will is entered in books kept for that purpose; but the original is not delivered out to the party, as in the case of deeds. Regularly all questions of title to land in the colonies are to be decided in the first instance, by courts of local judicature, from which an appeal lies to the king in council. But recoveries of lands in the colonies have been permitted to pass in the court of common pleas at Westminster<sup>n</sup>.

The colonial laws are now pretty well understood in England from the recent publications of several highly respectable writers, whose works are enumerated in the note<sup>o</sup>.

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11.---*Ships and Shipping Interests.*

The title to ships and vessels is much simplified by the late consolidated 'Act for the registering of British vessels,' 6 Geo. iv. c. 110, to which it is merely necessary to refer. The certificate of registry is full and conclusive evidence against all the world; and the mode of transfer is by endorsement thereon entered at the custom house when the ship is in port, and by a bill of sale when the ship is at sea. This bill of sale must recite the certificate of registry and be entered at the custom

house within thirty days after its execution, and the certificate must be produced at the custom house within thirty days after the arrival of the ship in port, whereon to endorse a memorandum of the bill of sale. By the 43 section, copies of the registry proved to be true, are declared to be evidence in all trials at law without production of the original or the attendance of the controller. If the original certificate therefore be not forthcoming and its absence can be satisfactorily accounted for, an official copy will effectually supply its place. The requisites of the act will, of course, demand strict and careful attention. These are too numerous for transcription here and can be only fully appreciated by reference to the act itself.

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12.---*Personalty.*

Goods and chattels in possession require no writing in evidence of a transfer of the right of property in them. They pass by delivery, but they are sometimes assigned upon trusts, or in pledge for security of a debt: then some writing is essential to shew the nature of the transaction, on which it is usual to endorse a memorandum that possession of a certain article has been delivered in the name the whole. This assignment when made as a security for money, is commonly called a 'Bill of Sale,' from the power of sale inserted in it if the debt or sum be not paid within a given time. A purchaser under such an instrument will have to look to the situation of the assignor and he should in particular, search the sheriff's office to see if any executions have been lodged against him, and at whose suit, and at what time. The bankrupt office should also

be searched for declarations of insolvency, and if the party was in prison or under arrest when he executed the bill of sale, the title of the purchaser will be placed in considerable jeopardy. The risk of a commission within two months after the assignment he will have to encounter ; and if he is aware of the assignor's insolvency or has notice of an act of bankruptcy it would be unsafe to deal with the property.

The only bill of sale that is entirely unobjectionable is that executed by the sheriff under a writ of *fiери facias*, which, though made to the plaintiff in the action, cannot be impeached by an immediate bankruptcy<sup>p</sup>. A bill of sale without delivery of possession is fraudulent against creditors<sup>q</sup>; if therefore the assignor has been allowed to retain possession up to the time of sale, the title is objectionable, and it has lately been decided, that if a trader in embarrassed circumstances gives a bill of sale of part of his property to a particular creditor, *that* is good evidence for a jury to say that it was fraudulent as against other creditors: and if so it is in itself a clear act of bankruptcy<sup>r</sup>. But it does not appear to be necessary to search the warrant of attorney office, as a judgment even, is no lien on personal property until an execution thereupon is lodged in the sheriff's office.

*Choses in Action*, such as legacies, bonds, debts, and the like pass by assignment only, and the principal object of attention in a title to them is to see that the holder, trustee, or obligor, has notice of the first and all subsequent assignments. The origin of the debt will of course require investigation, and the nature of the circumstances can alone suggest the proper en-

quiries to verify and support its existence and validity. An acknowledgment from the party that the debt is due or proof of the last acknowledgment or payment of interest are satisfactory circumstances. In *Ryall v. Rowles*<sup>s</sup>, the judges held, that in the case of a chose in action, you must do every thing towards having possession which the subject admits: you must do that which is tantamount to obtaining possession, by placing every person, who has an equitable or legal interest in the matter, under an obligation to treat it as your property. For this purpose, you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is for many purposes tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person.

*Legacies* :—On the purchase of a reversionary interest of money in the funds, it is necessary to inquire of the trustees or executors whether the interest contracted to be sold be actually existing and vested, independent of any or what contingencies; and if it be derived under a will, whether the debts are all paid and the executors assent to the bequest; also whether the legacy duty has been discharged. An attested copy of the deed or settlement should also be called for, and it behoves the purchaser carefully to examine the abstract with the documents abstracted, and particularly to observe in the afterpart of the deed or will abstracted, whether there are any conditions which reduce an apparent absolute interest to a contingency<sup>t</sup>. Trustees

however, always evince great reluctance either in giving a copy of the settlement or in permitting an extract or copy to be examined with the original, but I should apprehend that a party entitled to a vested reversion in any portion or sum affected by the settlement is entitled to inspect the deed conferring that benefit upon him and to a copy of so much of it as relates to that benefit. The purchaser may not be strictly entitled to require a memorandum of the sale to him to be endorsed on the will or settlement, but if such concession can be procured it is desirable, as it fixes a second incumbrancer with indubitable notice of the first transaction. But this perhaps may be the less necessary now it has been so fully decided that the act of giving the trustee notice, is figuratively speaking taking possession of the fund; it is going as far towards equitable possession as it is possible to go, for after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice<sup>u</sup>. To give notice is a matter of no difficulty: and whenever persons treating for a chose in action, do not give notice to the trustee or executor who is the legal holder of the fund, they do not perfect their title; they do not perform all that is requisite to make the thing belong to them in preference to all other persons, and they become responsible, in some respects for the easily foreseen consequences of their negligence. That precaution is always taken by diligent purchasers and incumbrancers: if it is not taken, there is neglect, and it is fit that it should be understood, that the solicitor who conducts the business for the party advancing the money is responsible for that neglect<sup>v</sup>.

The purchaser must run the risk of defalcation in the trustees. The Bank of England invariably refuses to

recognise trusts ; indeed half its funds are held on trusts and to notice them all would involve more business than could be dispatched by another court of chancery, efficient as that court is now becoming. It is impossible therefore for the directors to treat with any other persons than those in whose names the stock stands entered on their books. But if a suit be depending, the court of chancery will not allow the trustee to retain the power of rendering its decree a mere nullity by a previous transfer of the stock, but will on application of the parties, on a fair case of doubt or suspicion, grant a *distringas* to the bank not to pay out the funds or any dividend thereon without notice to the parties or a particular individual? But where a *distringas* was issued and served upon the secretary of the Bank of England, accompanied by a notice, that it was for the purpose of preventing the transfer and payment of stock and dividends standing in the name of W. W., but no bill had been filed against the bank or W. W., the *distringas* was under the circumstances of the case, set aside with costs <sup>w</sup>. Taunton insisted—That it had been the invariable practice of the court of exchequer to make use of the writ of *distringas* in the manner the plaintiff's had done ; and that the Bank of England uniformly regarded the writ, accompanied with a notice in writing, as an injunction against the transfer of any stock mentioned in the notice. He further insisted, that the Bank was considered in a court of equity as a trustee, and that the practice had been found most beneficial to the public, and had been upheld in two cases similar to the present <sup>x</sup>. The court however set aside the *distringas* with costs <sup>y</sup>.

Neither will the Accountant-general regard any volun-



tary notice from a purchaser of an assignment of any particular interest or share in dividends to which a party in the cause may ultimately be or is actually decreed entitled. The course in such a case is to apply to the court by motion or petition for an order on the accountant-general not to pay out the money or the dividends thereon without notice to the purchaser; then when the funds are due, the purchaser by his assignment, supposing it valid, is clearly entitled to them and could, I apprehend, by injunction or otherwise restrain a payment to the parties, or in other words, enforce payment to himself. From these observations it is clear that property of this kind is not the most eligible for mortgage or investment.

With respect to the purchase of a life interest in a sum of stock a question arises whether the transaction amounts to a *bona fide* sale of the dividends, or a grant of an annuity. This seems to depend entirely on the intention of the parties<sup>2</sup>. In *Charretie v. Vause*<sup>a</sup>, it was held that an assignment of £150, part of the dividends of a sum of stock to which the vendor was entitled for life, with a proviso that the purchaser should not receive any part of the dividends then growing due, but a proportionable part of the £150, was a grant of an annuity to that amount, and that it must be memorialised accordingly.

If a sum of money be left to a married woman for life, and after her death to her children, and if no children, to herself absolutely; if she be between fifty and sixty years of age and has had no family and there is not a prospect of any, the court of chancery has ordered the trustees to transfer the fund to the husband and wife ab-

solutely on an indemnity to be approved of by the Master<sup>b</sup>. At common law, the presumption is that a woman is never past the age of child-bearing, but in chancery a presumption more adapted to modern notions is it seems entertained. Nevertheless trustees could not be advised to make such a presumption of themselves without the sanction of the court, and therefore a mortgagee or purchaser of the fund from the husband and wife cannot have a clear title without an amicable suit to secure the trustees and to settle the indemnity.

On the purchase of a policy of *Life Insurance*, attention should be paid to the statute 14 Geo. iii. c. 48, s. 1, which declares that no insurance shall be made on the life or lives of any persons, or on any other event, wherein the person for whose use, or on whose account such policy is made, shall have no interest, or by way of gaining or wagering; and that every assurance made contrary thereto shall be void; and by sect. 3, it is declared that where the insured hath an interest in such life or event, no greater sum shall be recovered from the insurer than the amount or value of the interest of the insured therein.

The insurance therefore of another person's life can only be by way of indemnity against some pecuniary risk dependant on the contingency of his death before a certain event. A man may well enough be said to have an interest in his own life, but the statute is, against insuring the lives of other persons. A creditor has an interest in the life of his debtor to the amount of his debt but no further, and to that amount he may insure his debtor's life<sup>c</sup>; but as all insurance is now reduced

to a mere indemnity, if the creditor be satisfied by other means, he will have no legal claim on the insurance office for the amount of the policy on the debtor's death<sup>d</sup>; he must prove a loss by the defalcation or insolvency of his debtor before he can recover on the policy. A wife has an interest in her husband's life, and may out of her separate allowance effect an insurance of his life<sup>e</sup>. So a child has an insurable interest in the life of his parent<sup>f</sup>; but it may be questioned whether a husband has an insurable interest in the life of his wife, or a parent in the life of his child<sup>g</sup>, except that if the wife have a reversionary interest in a specific sum of stock, the husband may insure his chance of surviving the tenant for life, when he would become entitled in right of his wife to the whole fund; but that is clearly an insurance of indemnity, and cannot be carried further<sup>h</sup>. The husband may insure his own life in any amount, and assign the policy, even for a nominal consideration, for if the policy be good in its inception, it cannot, it seems, be rendered invalid by an assignment to a person who has no interest, for the statute in strict legal interpretation says nothing of assignments<sup>i</sup>. This decision however of his honour the Vice Chancellor (Shadwell), appears to require reconsideration, for otherwise the act may be entirely circumvented. On what principle the sales of life policies are conducted at the auction mart, I do not know, but the decision above referred to confirms the practice.

In strictness it should be seen as part of the title to a policy of life insurance, that the representations as to health, age, and interest, are borne out by available testimony<sup>j</sup>, but this is seldom done, the assignee contenting himself with possession of the policy and notice

to the insurance office ; he should also enquire whether the office has notice of any prior assignment, and whether the last premium of insurance has been duly paid. The vouchers attest this latter fact, but it is advisable to observe that the books of the office correspond. The Equitable Insurance office keeps no register of, or rather disregards notices of this kind, still the assignee must prove that he gave notice to the office to take the policy out of the order and disposition of the assignor becoming bankrupt <sup>k</sup>.

A policy of life insurance is annulled on the death of the insured by the hands of justice ; to hold otherwise would be contrary to public policy, and an encouragement to crime<sup>l</sup> ; deaths by duelling, or suicide are also usually made conditions on which the validity of the policy is to depend ; so departure beyond sea, or entry into naval or military service are risks which the offices will not take on themselves without additional premiums ; against which hazards the purchaser can obtain no further security than the questionable covenant of the assignor.

## CHAPTER V.

### OF THE DIFFERENT CHARACTERS OF THE CONTRACTING PARTIES.

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#### I.—AS TO THE SELLER.

#### *Of Titles under Trustees, Executors and Administrators.*

#### II.—IN REGARD TO THE BUYER.

#### *Of the Title required by a Purchaser, Mortgagee, or Annuitant.*

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#### I.—AS TO THE SELLER.

#### *Of Titles under Trustees, Executors and Administrators.*

When a contract is entered into with Trustees it is essential to see that they have a clear and express power of sale as distinguished from a mere constructive power; on the latter there may be doubt, and reference may be necessary to the court of chancery to settle that doubt or to define what power the trustees really possess. A second essential point in a dealing with trustees is to observe that they have not only power to give a good receipt but that that receipt relieves the purchaser from seeing to the application of his money.

Trustees unlike executors must all join in the receipt and conveyance, except as to such of them as have never acted and have renounced. Purchasers usually

call for some written evidence of the disclaimer and renunciation of the trustees who do not join in the conveyance, which according to a modern authority may be effected by any informal note in writing without a stamp or even by parol<sup>a</sup>. If a trustee has acted, he can decline to act only by the sanction of the court of chancery under the late act<sup>b</sup>, or by virtue of a power reserved to him for that purpose in the deed or will creating the trust. On the appointment of new trustees and a sale by them, the power enabling the appointment will require attention, and the mode of executing that power sometimes gives rise to questions of considerable nicety. When a sale or exchange is effected by substituted trustees, the words of the authority and the deed of substitution should be scrupulously regarded. It is difficult to say that any other than a literal observance of the words of the power can be depended upon;—the concurrence of parties whose consent is not necessary is as objectionable as the want of consent by those who are deputed to watch the exercise of the power. Titles depending on these points require all the sagacity of the most vigilant Conveyancer.

But it seems to be no objection to a title, that a person who was sixty years ago a survivor of three trustees appointed by will for the sale of an estate, did not execute a conveyance purporting to be made by him and the parties beneficially interested, possession having gone under that conveyance, and the estate in equity being converted into personalty<sup>c</sup>. The assignment or conveyance however of some of the trustees can only operate on the shares of the joint tenants who join; it is a severance of the joint tenancy as to the others. A modern title would be rendered objectionable by the

non-concurrence of a trustee who has proved the will and clearly acted. But a judgment creditor obtaining an assignment from two trustees of an attendant term, has been preferred to a mortgagee who procured an assignment from the other trustee first <sup>d</sup>.

A charge of debts on real estate gives the trustees or executors a power of selling and conveying the fee, and if the debts are not specified or scheduled they have also ample power of giving a good and valid receipt and discharge for the purchase money. Whether the concurrence of the heir at law in the conveyance can be insisted on, is a point on which opinions vary. That subject is too discursive for the present essay, the references in the note will lead to its principal merits <sup>e</sup>. It seems however clear that the devisee subject to the charge of debts is not a necessary party, for he is entitled only to so much of the property as the executors leave after selling a sufficient quantity to answer the debts.

But if a suit be depending for the administration of assets, it is then dangerous to deal with the trustees alone. The trustees and executors must necessarily be parties to such a suit. Lord Camden C. has said, that though the court of chancery has established it as a rule, that where the charge is general, the purchaser is not bound to see to the application of the purchase money; yet if the trustee is called upon in that court, it takes the execution of the trust out of the hands of the trustee, to be executed by the court. The trustee by his answer parts with the execution of the trust to the court, and where the court has attached its jurisdiction, it would be inconvenient to permit a sale but by

the court. His lordship added, that though a general charge does not make a purchaser before the suit see to the application of his money, yet after a suit commenced, he should hold him bound by the decree ; and he should say, as a general rule, that an alienation pending a suit was *void*<sup>f</sup>. This latter position, however, is somewhat qualified by the observations of the Vice Chancellor in a subsequent case, who said that the concluding passage of Lord Camden's judgment, declaring as a general rule, that an alienation pending a suit is *void*, must be understood with reference to the subject he is speaking of, and not absolutely<sup>g</sup>.

*A lis pendens* is notice to all the world<sup>h</sup>. It therefore behoves persons dealing with trustees and executors to enquire, and search if necessary, for suits depending respecting the administration of assets. If a suit be instituted the purchase cannot safely be completed without the sanction of the court and payment of the money into the bank pursuant to the general orders and statutes on that subject.

In a sale under a decree it is necessary to see that the report stands confirmed, and it may be necessary to enrol the decree to make it final and only impeachable by appeal, if indeed an interlocutory decree can be enrolled. The court never confirms an order when the purchaser has made a profit, except on the terms of his bringing the profit into court<sup>i</sup>. This is another reason why the decree should be affirmed as soon as possible. In a sale under a decree the court does not warrant the title, but the purchaser places great reliance on that part of the decree which directs that he shall hold and enjoy the property unmolested<sup>j</sup>, and it seems cer-



tain that the sale cannot be impeached for the want of consent of some of the parties, though the monies have been misapplied<sup>k</sup>.

*Prima facie* there is this distinction between executors and trustees; that one executor can, and one trustee cannot give a discharge, and it may frequently happen, as in *Brice v. Stokes*<sup>l</sup>, it actually did happen, not only that one trustee cannot give a discharge, but that the instrument of trust provides that there shall be no discharge without an act in which *all* the trustees shall join. Executors and trustees are undoubtedly of different characters, and the distinction between them is appreciable though they stand united in one person. When trustees are appointed executors, they may, it is apprehended, prove the will and accept the executorship without accepting the trust, but the inference is that by proving the will they do accept the trust, and it will remain to be shewn, if they deny the trust, that they have expressly disclaimed and have never acted therein.

In dealing with an executor it is necessary to shew that he has proved the will. No one becomes complete executor for transmitting the succession until probate of the will in a court of competent jurisdiction. But though probate be essential to the executor's title, it is observable that he derives his power from the will, which may be proved at any time, even after the executor's death; and whenever the will is proved, the assignment is admissible in evidence and will establish the deduction of title from the executor<sup>m</sup>.

In court, an examined copy of the probate is evidence that the person there named is executor. But an ex-

amined copy of the will is not evidence of that fact; nor can the original will itself be read in evidence, unless it bear the seal of the spiritual court, or some other mark of authentication. If the probate be lost, an exemplification of it from the records of the spiritual court will be evidence of the will having been proved<sup>a</sup>. And it is observable that a probate under the seal of the ordinary unrevoked is conclusive as to the appointment of executor and the contents of the will; and cannot be impeached by evidence in the courts of common law<sup>c</sup>.

An administrator acquires no interest in the personal estate of his intestate until he has procured letters of administration, and he cannot therefore assign a term previous to that period. But if the person assigning the term before administration, afterwards takes out letters of administration, it is open to contend that by intermeddling with the effects before administration granted, he becomes executor *de son tort*, and the acts of an executor of that character are good in themselves, subject merely to review by an administrator subsequently constituted, and if he be himself that administrator, there does not appear to be much objection to a title to a term assigned by him before administration granted.

The title of an administrator is proved in court by the letters of administration; or by the original book of acts, which directs the grant of letters of administration, with the surrogate's *fiat*, or by an examined copy of the entry in such original book. The letters of administration must be properly stamped, or they are absolutely void; if therefore it appear that the plaintiff sues as administrator for a greater value than is covered by the *ad valorem* duty on the letters of administration,

he cannot recover in the action<sup>p</sup>, if the proof of his being administrator be a necessary part of his case.

After a considerable length of time, say forty years, it may be presumed, if necessary, that a person was executor or administrator who appears to have acted in that capacity. After a lapse of thirty or forty years, it is not always required that the recital of an executorship be verified by the production of an office copy of or extract from the will<sup>q</sup>; but a captious or unwilling purchaser may, it is apprehended, insist on such verification, for if the party professing to be executor or administrator was not really so, any person now taking out administration may recover, notwithstanding the lapse of time, which does not begin to run till the grant of the letters of administration—not from the death of the testator or intestate.

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II.—IN REGARD TO THE BUYER.

*Of the Title required by a Purchaser, Mortgagee or Annuitant.*

From the well-known provision respecting the limit to the highest remedy in the law, purchasers have from time immemorial claimed a right to investigate the title sixty years at least; and it is sometimes insisted that they are entitled to inspect all deeds recited or noticed by other deeds or documents within that period.—There is no dispute says Sir John Leach V. C. ‘that the recital of a deed is constructive notice of its contents; but to say that a purchaser is not to complete his contract unless he has the actual inspection of every deed of which he has constructive notice by recital,

would lead to a practical inconvenience, which would be manifestly absurd. In some families, title-deeds are preserved for centuries; and if the earliest of those deeds recites a former instrument, made five hundred years since, but not now existing, it would be absurd to say, that a contract is not to be enforced against a purchaser because that deed cannot be produced. There must of necessity, therefore, be some practical limit to the operation of this objection; and the true enquiry seems to be, in every case, whether the absence of the deed recited throws any reasonable doubt upon the title of the vendor. *Prima facie*, it is to be presumed that the purchaser in the ancient conveyance had actual inspection of every deed recited, and was satisfied with their contents; and further, it is to be observed, that it is not probable that a vendor would recite deeds which afforded evidence against his title. When there is no circumstance to repel the effect of these general presumptions, and *when the title under the conveyance which contains the recital is fortified by sixty years undisputed possession, I think it a good practical rule to hold, that the loss of a deed recited throws no reasonable doubt upon the title of the vendor, and that the purchaser must complete his purchase* <sup>r</sup>.'

The established rule is, that a person who has entered into a contract for purchase in the usual way, without any information as to the title is compellable to complete his contract, unless he can object to the title shown; the possible existence of documents unproduced is not a good ground of defence<sup>s</sup>. The recital of a recovery is no evidence of an entail; for nothing is more common in old titles than to find a recovery suffered without reason except merely to strengthen the title generally. If

an abstract commence with a will wherein the property is described indefinitely, the deviser's seisin of the particular lands will require proof. So if the abstract commence with a conveyance by a person described as heir at law, the purchaser is sometimes required to prove the intestacy of the ancestor, but if that carries the title back beyond the period of sixty years the right to such a requisition may be questioned.

The purchaser is clearly entitled to a history of the rights of property and possession for at least sixty years. That term is not a positive invariable period, but merely the shortest time within which a title can be considered as entirely relieved from the possibility of latent defects. Whether the purchaser is entitled to an abstract of all the deeds in the vendor's possession is a question on which opinions differ.

The rule I take to be this :—The vendor is not obliged to go further back than sixty years from the time of investigation. He may therefore by reference to land-tax or poor rate assessments, old leases, affidavits or other means, shew a seisin and possession in A. sixty years ago, and deduce a title from him, though it may be thirty years before A. makes any will or conveyance. By this means the title prior to A. may be suppressed. *He* may have been tenant in tail, and that entail may not have been barred or the remainders over destroyed, yet if the title commences with proof of A.'s seisin, the inference is that that seisin is in fee until the contrary appears. The purchaser can know nothing of the entail unless he becomes acquainted with it by other means, and in ignorance of its existence he can, of course make no objection to the title on that account.

However strong his *suspicion* of ~~an~~ entail may be, still if he has no direct proof to adduce (which it is not very likely he can have), the mere surmise of a defect will not afford him a sufficient plea for rejecting the title. The palpable dishonesty of such a proceeding, supposing the vendor conscious of the defect, would doubtless be visited with very severe rebuke, but the purchaser's only remedy is an action at law or suit in equity for recovery of his purchase money, which however a dishonest vendor may find means to evade.

The question in such an action or suit would be, whether the vendor fraudulently suppressed the defect; and the jury would perhaps be directed to presume fraud if there was reason to apprehend that the vendor was in any way acquainted with the deed or will creating the entail. If it be proved that he received a packet of 'old deeds' from *his* vendor and never gave them any particular regard, a jury would not, I apprehend, presume fraud, although it may appear that he casually opened the packet and found something there not exactly satisfactory. If on the contrary it appears that he purchased ten or twenty years ago and could not have had a fair title without a knowledge of the objectionable deed or will, then the suppression of that document on a future sale would be considered as a fraud upon the purchaser, and a verdict would no doubt be given in his favour for the consideration money and expenses; and he would also have a lien on the estate in equity as against the vendor for the sum found by the verdict and interest.

But what advantage would this lien confer? Could the purchaser obtain a decree for sale; and if he sells

could he imitate the example of his vendor and suppress the defect, or would he be justified in exposing and publishing it to the world? To foreclose the lien would be to put himself in the exact situation he was in before, except perhaps that he may recover any balance if it could be struck against the vendor. Altogether the situation of the purchaser in this case is embarrassing in the extreme even if he is successful in his action; and it would be very difficult to make out a case of direct fraud against the vendor if the 'old deeds' were actually delivered over to the purchaser. If the vendor aver that he considered the suppressed entail extinct, would it not lie with the purchaser to shew the existence of some descendant in the line of entail? This is an addition to his difficulties, and shews how necessary it is to look to the respectability of the parties with whom we are dealing. A suppression of the abstracted deeds would be a serious departure from the rules of good faith on the part of the vendor; for by that means the hostile documents might fall into the hands of the very person who might take advantage of the defect; and a destruction of them could be justified on no consideration.

The rules of equity and fair dealing require the vendor to deliver an abstract of all deeds creating any defects or incumbrances on the title, in order that the purchaser may form his own judgment on the value or risk of such defects or incumbrances. But the vendor is at liberty to exercise a sound and honest discretion, and is not by the common rules of practice bound to abstract all the deeds in his possession which would carry the title back for a century or more. These he commonly ties up in a bundle and when the

purchase is completed delivers them over to the purchaser as a packet of useless and worn out muniments of title. The effect is to throw the *onus* on the purchaser to shew by these antient records an existing defect on the modern title; whereas if those documents had been abstracted, the *onus* would have laid with the vendor to shew the satisfaction or reconveyance of any supposed outstanding estate or incumbrance.

It is true that when the vendor on a bill for specific performance is required to carry in the deeds before the Master; he is obliged to swear that they are *all* the deeds in his possession; but that does not prove that he is bound to support all the documents in his possession or that he is compelled to shew the extinction of all the estates tail in settlements eighty or a hundred years old by legal means; the presumption is that if nothing has been heard of an estate-tail for half a century—thirty years barring a writ of formedon—that the entail is extinct by natural means, and it will be for the party denying that presumption to adduce evidence in support of his assertions. It is difficult to admit any legal or moral obligation on a vendor to abstract all the antient deeds in his possession; he is bound to deliver them over on completion of the purchase, but he may save himself the expense of the useless discussion which an abstract of their contents would probably engender. He is bound to give the full effect of those deeds which he does abstract, but he is not obliged according to a recent decision previously mentioned to substantiate by collateral evidence all the antient narrative contained in the recitals of those antiquated assurances; neither, therefore, if those recitals were abstracted in chief, would he be bound to support them, and if not, there should be no necessity or obligation to abstract them.



But though the seller may be justified, or rather though he may incur no legal responsibility in withholding or not abstracting antient and useless documents of title, yet he is entirely indefensible in suppressing intermediate deeds, which are supposed, in event, to have become immaterial to the title, as where a mortgage has been paid off and the estate reconveyed; in which case the deeds of mortgage and reconveyance are sometimes laid aside under the notion that the parties are placed *in statu quo* by the reconveyance, and from an anxiety to keep out of sight the circumstance of the mortgagor having incumbered the property. But the notion is often erroneous, and the practice very improper; the revocation of a will, or some other effect extremely important to the title, may be induced by the suppressed deeds<sup>a</sup>.

‘In cases of doubt and suspicion,’ say the Real Property Commissioners in their second report, ‘enquiries should be made from the occupiers of the lands and from persons who have long dwelt in the neighbourhood; county and local histories should be examined and searches should be instituted for land-tax assessments, awards under inclosure bills, grants from the crown, grants of annuities, records of fines and recoveries, enrolment of deeds, judgments entered up in the several courts of record, securities given to the crown, probates of wills, and grants of administration. In every case, except where the property is too small to make risk important as compared with present expense, investigations of this nature, adapted to the circumstances are prosecuted to a great extent, and they occasion a considerable portion of delay and expense, which are felt to be the great evils now attending the transfer of real property.’ We may add, that if the legal estate be out

in mortgage, enquiry should be made of the mortgagee whether he has entered into any contract under the power of sale, if any; also how much is due for principal and interest, and whether the mortgagee claims any and what other lien beside the mortgage money and interest; and particularly and essentially whether he has received notice of any subsequent or intervening charge or incumbrance.

It is held generally, that whatever is sufficient to put a purchaser upon enquiry, is good constructive notice; in other words, that when a man has sufficient information to lead to a fact, he shall be deemed acquainted with that fact. When a title is made out through a deed, the purchaser has constructive notice of every circumstance to which that deed leads, by recital, by description of parties or otherwise, immediately or remotely. So a purchaser who has notice of a deed, has constructive notice of all its contents, though his advisers may not have thought it necessary to examine or require the inspection of the instrument. Where an estate is in the occupation of tenants, the purchaser is deemed to have notice, not only of their actual leases but of any agreements relating to the property which the tenants may have made with their landlord.

These considerations suggest the proper requisitions to be made on behalf of a purchaser. He is entitled to an answer to all pertinent enquiries, but to some of his questions he must rest satisfied with a mere negation. The purchaser's solicitor has discharged his duty by making the enquiry, and he should preserve some written memorandum of the answer for his future justification. A denial of any knowledge of the facts sought

will put the purchaser on proving if he can their existence and relevancy to the subject in sale.

The expense of searches for baptismal and other registers and entries to support the abstract, falls of right on the vendor and his solicitor usually makes them, but it cannot be supposed that the same care and diligence is always exerted by this party as by an agent more directly and deeply interested in the result. The search should properly be conducted by the solicitor for the purchaser, but this is seldom allowed, and it is observable that the vendor is responsible for the correctness of searches made by his solicitor on the purchaser's behalf<sup>t</sup>. The purchaser is at the expense of searching for judgments as it is made for his satisfaction, and the search is consequently conducted by his solicitor.

A title may be substantially good yet defective for want of full and complete evidence of the various deeds and statements of which it is composed; such may be considered a good holding title but it cannot be called a strictly marketable one, and if the contract be for a 'marketable title' or a 'good title' generally, this want of full and complete evidence is certainly a blemish, and it is frequently laid hold of for an abatement in the price. A court of equity will not now, as formerly, decide whether a title is good or bad. It will merely pronounce whether it is such a title as the purchaser should accept. The distinction between an unmarketable title and a bad title does not, however, prevail at law; for there every title which is not proved to be bad is considered marketable<sup>u</sup>. There can be no mathematical certainty in a title; a moral certainty is sufficient<sup>v</sup>. Mere possibilities that the title will be disturbed, as suggestions

of old entails or doubts as to what issue persons have left, will not as before hinted be considered substantial objections<sup>w</sup>. But if a claim exist unsatisfied, the improbability of its being enforced will not render the title valid<sup>x</sup>. Neither will a title be forced on a purchaser, either at law or in equity, if he can only acquire it by litigation or judicial decision<sup>y</sup>; nor will a case be directed to the judges as to questions of title if the purchaser object to that mode of proceeding<sup>z</sup>.

With respect to restrictive conditions of sale which are now growing into such general use, Sir J. Leach V. C. has said that every person who proposes an estate for sale without qualification, asserts, in fact, that it is his to sell, and consequently, that he has a good title; but a vendor if he thinks fit, may stipulate for the sale of an estate with such title only as he happens to have<sup>a</sup>. The right therefore of the vendor to introduce conditions of this kind is undoubted. But it is submitted that these restrictive conditions should and will be construed very rigidly, for they are in derogation of common right. In themselves they create suspicion,—the very attempt at concealment induces an impression that some troublesome defect would be disclosed by a fair exposure of the title. To meet conditions of this kind on fair grounds, the purchaser should stipulate that the vendor shall receive the purchase money tied up in a bag without inspection. The purchaser's right to avail himself of an objection obtained through information derived from other sources than the abstract, depends in a great measure on the wording of the conditions. If they stipulate that the title prior to a particular period shall not be required, it seems clear from a late case<sup>b</sup> that all objections prior to that period are to be considered as waived: and if the

abstract commence at the time specified with a deed which describes the grantor as heir to a former proprietor, that descent cannot by the common practice be called for, as it necessarily involves the title prior to the time mentioned.

The evidence required by a *Mortgagee* is in some respects different from that required by a purchaser. The latter becomes as it were married to the title, he takes it for better or for worse, and he is often advised to accept a holding as distinguished from a clear undeniable marketable title. His object is the land and a willing purchaser will overlook many trifling objections and defects in the evidence, if he can be assured that the title is radically good ; he obtains all the evidence he can and then weighs the objections unanswered with the pleasure or profit he anticipates from the acquisition of the estate. A mortgagee on the contrary does not look to the land *qua* land as the principal object of his contract ; the security of his money is the chief concern with him : he requires a clear marketable title, as free from suspicion as Cæsar's wife ; he is often, indeed commonly, a stranger to the property and to the mortgagor, and he scrutinises both, with a suspicion uncalled for by a purchaser, who usually has some local knowledge of or connection with the land.

Further, a purchaser almost invariably enters into a written contract for the purchase, by which the exercise of his free will is much restricted, he is curtailed of the benefit of reasonable apprehension however well founded unless he can bring it to the test of actual proof. A mortgagee however seldom enters into a written contract to advance the money but consents to the loan if

he approves of the title; now by this approval he means more than strict legal approbation, he expects that all circumstances shall be concurring and consenting and that he and his legal advisers alone shall be the arbiters of what shall be deemed a good and unexceptionable title. If he sees any suspicious circumstances he may break off the contract at any moment and proceed against the mortgagor for the expenses incurred, provided he can adduce some reasonable grounds for his suspicion; and he is at liberty I apprehend to break off the treaty at any instant without assigning, or indeed without having, any direct reason further than his own caprice: in that case I should think he could not recover his expenses of the mortgagor, but on the contrary that the mortgagor may recover all expenses incurred by answering his objections or otherwise of him, particularly if the draft mortgage has been sent to his solicitor, which indicates a general approval of the title and a partial acceptance of the security.

An *Annuitant* is much in the same situation as a mortgagee and the foregoing observations may be applied to him with the same force and relevancy. An annuitant is the connecting link between a purchaser and mortgagee. He is in one sense a purchaser as he cannot like a mortgagee call in his money, but his object with the land is mere security and not occupation, so that in passing and accepting the title he is much in the same situation as a mortgagee.

## CHAPTER VI.

### OF THE EVIDENCE RELATING TO THE DISCHARGE OF INCUMBRANCES.

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| 1. <i>Judgments.</i>             | 12. <i>Composition Deed.</i> |
| 2. <i>Crown Debts.</i>           | 13. <i>Dower.—Curtesy.</i>   |
| 3. <i>Statutes.</i>              | 14. <i>Mortgages.</i>        |
| 4. <i>Recognizances.</i>         | 15. <i>Annuities.</i>        |
| 5. <i>Lis Pendens.</i>           | 16. <i>Legacies.</i>         |
| 6. <i>Warrant of Attorney.</i>   | 17. <i>Portions.</i>         |
| 7. <i>Cognovit.</i>              | 18. <i>Rents.</i>            |
| 8. <i>Bond.</i>                  | 19. <i>Land-tax.</i>         |
| 9. <i>Simple Contract Debts.</i> | 20. <i>Rates.</i>            |
| 10. <i>Bankruptcy.</i>           | 21. <i>Tithes.</i>           |
| 11. <i>Insolvency.</i>           | 22. <i>Protection.</i>       |
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#### 1.---*Judgments.*

The necessary inference is, that the estate is sold 'free from incumbrances' without the insertion of those words in the contract for sale. There are several peculiar incumbrances which do not attach on any particular farm or estate of the obligor but on all his lands generally. Mention is seldom made in the abstract of the existence of any incumbrances of this kind, notwithstanding Lord Kenyon's remark that the abstract is not perfect without such disclosure. This general want of information obliges the purchaser to make many searches and enquiries quite in the dark ; nevertheless the expense of such searches, if the contract is recinded

may be recovered of the vendor; but if the purchase be completed, they fall by common consent on the purchaser. If any incumbrances are found, it belongs to the vendor to procure their discharge, and to bear the expense of whatever may be necessary to ensure and prove their entire satisfaction. Thus he must not only pay the money but pay the expense of entering satisfaction on the record, and the cost of a good and valid release, if necessary.

Judgments, crown debts, statutes, and recognizances are the principal incumbrances of this kind.—Judgments are the most common and first claim our attention. But before we can speak of the discharge of this species of incumbrance we must consider the circumstances under which a judgment, if it be found to exist, actually becomes a lien on the land; for as to judgments which do not affect the land, it cannot be necessary to pay any particular regard, as they are in fact already discharged, or rather do not attach, and consequently require no discharge.

In the exercise of a wholesome discretion it is natural to expect that in some cases a superabundance of caution will be induced. This was particularly the case with the older conveyancers, who, in order to make security double sure, sometimes put the purchaser to the expense of three conveyances of the same property, either of which taken separately would have been equally valid and effectual. They first exercised a general power of appointment with great circumspection; then, in fear of some informality, they made the appointor release and convey all his remaining estate and interest in the land; and in case these conveyances should



be lost, they recommended a third conveyance by bargain and sale, to obtain the permanent security of enrolment. The stamp duties occasioned the disuse of the bargain and sale, but as the appointment and release are usually contained in one deed, without any necessity as is generally supposed, for a double stamp, modern conveyancers follow the practice of taking a double conveyance in a great many cases where a simple appointment would be abundantly sufficient; for if the power be exercised at all, the covenants are equally collateral, whether the deed contain a release or a simple appointment, for the appointment if good, renders the release a nullity.

It has lately been adjudged on solemn argument that if lands are conveyed to such uses as A. shall appoint, and in default of appointment to A. for life, with remainder to B. during his life in trust for him, with remainder to A. in fee; and A. appoints and conveys to C. in fee; C. is entitled to priority over A.'s judgment creditors who have no lien on, or claim against the estate in the hands of a *bona fide* purchaser from A.—Lord Tenterden C.J. observing that it had been established ever since the time of Lord Coke, that where a power is executed, the person taking under it takes under him who created the power, and not under him who executes it. The only exceptions were, where the person executing the power has granted a lease or any other interest which he may do by virtue of his estate, for then he is not allowed to defeat his own act. But suffering a judgment was not within the exception as an act done by the party, for it was considered as a proceeding *in invitum*, and therefore fell within the rule<sup>a</sup>.

The effect of this decision is to render a search for judgments unnecessary in all cases where the property is conveyed to uses to bar dower. In eight conveyances out of ten this will be found to be the case ; and in future, the proportion will be greatly increased ; for no one will now think of taking a conveyance to any other than the common uses to bar dower. The consequence will be that in a short time, a search for judgments on the completion of a purchase, will become a novel proceeding ; another consequence will be that the statute of Westminster, which distinctly gives ‘all the goods and *half the lands*’ of the debtor to his creditor will virtually stand repealed. And though the act now before parliament<sup>b</sup>, declaring ‘that no widow shall be entitled to dower out of lands devised or sold’ be passed, still the common uses to bar dower will in practice be continued, if this ulterior advantage in respect of judgments be derived from them.

If this decision be adopted in practice as no doubt it ultimately will, though cautious advisers will probably for a time recommend purchasers to search for judgments, for fear of some informality in the appointment, the alienation of property will be greatly facilitated as it will not in the cases alluded to, be necessary to institute a tedious and expensive search for judgments just at the conclusion of the treaty. This, it is true, is at the expense of the creditor, but the disadvantage which this fetter on the alienation of *all* real property creates, is not balanced by the justice of allowing one casual and particular creditor his full demand in preference of all others, especially as that creditor did not look originally to the land as his primary security, and who by due diligence might by his writ of *elegit* have dis-

trained the property in the hands of his debtor. If the creditor be in actual possession under a writ of *elegit*, the purchase cannot of course be completed as the vendor cannot deliver possession. No purchaser with proper advice, would under such circumstances accept a conveyance, even with the assignment of a term created prior to the judgment, if his only mode of obtaining possession be by resort to an action of ejectment against the *elegit* creditor; for it cannot be predicated that the judgment is *in invitum* when in fact it is in actual execution, and a prior legal estate, it must be remembered is unavailing if the purchaser has notice of the judgment, which if the creditor be in possession, he must be presumed to have. It is quite clear that the vendor himself could not eject the *elegit* creditor without discharging an incumbrance created by himself. It may therefore be proper to search the sheriff's office for *elegits*, though by the operation of an appointment, judgments may be superseded.

*Second.*—If there be an old outstanding term attendant on the inheritance, unassailable by the modern doctrine of presumption, or a satisfied term created by a former proprietor which clearly covers the period of search, and this term is ready to be assigned for the purchaser's protection, a search for judgments may then also be dispensed with, provided the purchaser has no notice of the judgment; but then the sheriff's office should be searched for *elegits*, for the statute of frauds gives the creditor a remedy against such trust estates as he is possessed of at the time of execution sued; though following the wary caution of our learned predecessors, a search for judgments is still recommended, and the term is preserved as a foil for 'dormant incumbrances' only.

As to judgments (even if undocketed<sup>c</sup>) of which the purchaser has notice before the completion of the contract, the term will afford no protection, but it remains with the purchaser to acquire notice by a search. He is not bound to inspect the records of the courts at Westminster, if he chuses to rely on the validity of his term, and has not any notice of the judgment by other means. The docket itself is not notice for this purpose in the court of chancery, where alone the doctrine of notice can be called in operation<sup>d</sup>. If therefore the purchaser carefully abstains from searching for judgments, the docket will not be a witness against him. Constructive notice however is equally prejudicial to his security as actual notice, and it is to guard against a surprise on this head that a search is generally recommended. The vendor cannot prevent the purchaser from acquiring notice; and of such judgments as are found, the vendor must of course procure the discharge. But if the vendor have a general power of appointment, he may insist on the purchaser's completing his contract without satisfaction of judgments discovered, as the appointment, according to the case above alluded to, vests the property in the purchaser as from the author of the power, and so paramount the appointor's incumbrances not created by an exercise of the power.

*Third.*—If the legal estate be outstanding in a trustee, docketed judgments against the *cestui que trust* create no lien on the land in the hands of a *bona fide* purchaser taking a conveyance from them both, provided execution hath not issued on the judgment, for the statute of Westminster applies only to legal estates, and the statute 29 Car. ii. c. 3. s. 10, authorises the seizure of those trust estates only which the debtor has at the

time of execution; hence alienation defeats the judgment, provided an *elegit* be not lodged with the sheriff. Search for judgments therefore may be dispensed with (and indeed discovered judgments may be altogether disregarded) on the purchase of an estate out in mortgage where a conveyance of the legal fee is taken from the mortgagee, but enquiry should be made of the under-sheriff, on the day the purchase is completed, whether any *elegit* has been lodged against the mortgagor. Docketed judgments against the mortgagor prior to the execution of the mortgage cannot of course be evaded, for the lien having once attached on the legal estate it cannot be defeated.

The trust also must continue in the debtor solely<sup>c</sup>. If therefore he conveys his equitable interest to trustees in trust for himself and others, or in trust for the benefit of his creditors, before the 'time of execution sued,' the judgment will be defeated; for per Best C. J. 'the statute (29 Car. ii. c. 3. s. 10,) only authorises the sheriff to take such lands as the *trustees* are seised of at the 'time of execution; so that while a judgment binds the *legal* estate of a party from the time it is signed, it only affects such *trust* property as he is possessed of at the *time of execution sued*<sup>f</sup>.' (S. C. inf. 229.)

*Fourth.*—Copyhold estates not being liable to executions, are of course exempt from the lien of judgments.

*Fifth.*—Leasehold and personal estates are affected only from the time of execution sued. A search therefore in the sheriff's office for *elegits* against the vendor, is the proper precaution with respect to judgments on the purchase of properties of this description.

*Sixth.*—The lien of Judgments will attach on Life Estates, whether legal or equitable, to the extent of the interest, in the same way as on estates of inheritance. Thus where an estate was devised to a trustee in trust for A. during his life; and A. being indebted procured the concurrence of the trustees in an assignment of his life interest in trust for the benefit of his creditors, and a creditor by judgment afterwards issued out an *elegit*; it was held that A.'s interest could not be taken under this *elegit* as the legal estate was in the trustees at the time of the judgment, and A. had not a sole equitable estate at the time of execution.—Best C. J. observing, that if A. had a legal estate in the premises at the time of the judgment, it would have been bound by the judgment, and the conveyance to creditors would not have prevented it being taken by the *elegit* issued against him. But if the legal estate was in the trustees, A. had only an equitable interest, and then a conveyance by the trustees before the suing out of the execution exempted the property from any liability to that execution.<sup>s</sup>—Besides A. had not a sole equitable interest at the time of execution sued, and it would be difficult for the sheriff to ascertain what A.'s interest was after payment of his debts, and much more so to attach such a portion of the lands as would be equal to one moiety of that undefinable interest.

*Seventh.*—The old statute of bankrupts (21 Jac. i. c. 19. s. 9,) provides that all creditors by judgment, whereof execution is not served and executed before the bankruptcy, shall come in only ratably with the other creditors. Similar provision is made in the late bankrupt act (6 Geo. iv. c. 16. s. 108). Consequently a search for judgments against the bankrupt will be

unnecessary when the estate is derived through his assignees.

*Eighth.*—If there be neither term, trustee, nor power, and the purchaser is to take a conveyance of the legal estate direct from the vendor, then judgments against the latter, docketted pursuant to the statute 4 & 5 W. & M. c. 20, will, by virtue of the statute of Westminster the 2nd (13 Edw. i. c. 18.) bind the estate into whosoever hands the lands may fall. It is therefore a duty of paramount importance for the purchaser in such case to search for judgments; for though the docket be not in itself notice, yet if the moment a judgment is docketted it becomes a lien on *all* the lands of the debtor, it is obvious that whether the purchaser searches for judgments or not, he will be bound by them and must take the consequences of not acquiring that information which by due diligence he might have obtained.

The lien of judgments once attaching on the legal fee cannot be defeated by any species of alienation whatever<sup>h</sup>. The want of notice is not an answer to an *elegit* creditor claiming under a duly docketted judgment, for it was culpable laches in the purchaser to complete his contract without searching the records of the courts at Westminster. It is therefore at the peril of his purchase money that the purchaser in such case withholds or neglects making the due and regular searches. And a search for judgments ought not to be dispensed with even though the sale be made in pursuance of a judicial decree; for should there be any judgment creditor who refuses to come in under the decree, he will not be precluded from suing out execution against the lands of the vendor in the purchaser's hands<sup>i</sup>.

*Generally.*—It is observable that the solicitor for the purchaser is justified in discontinuing his search for a longer period than ten years, as also in not searching for incumbrances against any other proprietor than the vendor, if he finds no judgment entered up against him within that time, unless there are very obvious reasons why the search should be continued farther or against a former proprietor. With respect to the *person* against whom it is necessary to search for judgments, the presumption is, that the notorious change of ownership and possession occasioned by a sale, would have brought to light a docketted judgment if any existed against a former proprietor; it is also presumed that each purchaser in the title has exercised the common prudence of making a regular search for judgments against his vendor. With respect to the *time* during which it is usual to search, the term of ten years has been fixed upon as a convenient and probable period during which it may fairly be supposed a judgment creditor whose debt is honestly incurred would not remain dormant.

The courts of King's bench and Common pleas are the only courts which it is usual to search, unless the purchase be large or the character of the vendor be not thoroughly known or highly respectable. The expense of that search is sufficiently formidable at the rate of 4d. per term, to make it a matter of solicitude to avoid the necessity of a search whenever it can be safely dispensed with. The court of Exchequer is now thrown open to general business, and it may therefore be proper to institute a search for judgments in that court also, at least more generally than has hitherto been the custom. Decrees in chancery do not create a lien on lands in the same way as judgments at common law,



yet if a *suit* be depending in chancery, the purchaser will be bound by the result, though if the proceeding be terminated in a decree enrolled, the purchaser without actual or constructive notice of the decree will not, it seems, be bound by it, particularly if it be not acted on within a reasonable time afterwards<sup>k</sup>. Judgments and decrees affecting lands in York or Middlesex require registration by the strict letter of the registry acts, but they are not always, nor indeed often, registered, and a search in the registry office for judgments, though not altogether novel, is considered by the officers as unusual and as affording incomplete evidence of the object sought.

That a judgment is satisfied in twenty years, where there is no claim or acknowledgment in the interval, is a fair presumption, and in practice the expense of searching for half that time is considered sufficiently exonerating and prudential. Numerous cases are mentioned in the books where judgments have been entered up on warrants of attorney and executions granted on judgments upwards of twenty years old, but the circumstances have been very peculiar and the difficulties attending the collection of sufficient proof to obtain a *scire facias* for this purpose, shew that the practice as at present established is amply extensive for all purposes of security. It has lately been held that old judgments existing against a former owner of leaseholds, who parted with the property in 1770, and to enforce which no steps appeared to have been taken, afford no valid objection to the title<sup>l</sup>.

In Ireland judgments have for almost a century, become common securities, so as nearly to supersede the security by mortgage. But that they have become

securities of equal validity with mortgages, and still more with registered mortgages, Lord Plunket could not collect <sup>m</sup>. Judgments in Ireland are always registered, and therefore search in the registry office (where priority is determined according to the order of registration) affords ample indemnity.

A judgment while it remains on paper may be vacated <sup>n</sup>, but when once entered of record it can only be discharged by a satisfaction-piece under the warrant or authority of the plaintiff or his personal representative <sup>o</sup>. The purchaser cannot insist on a formal release from the creditor; he must be content with satisfaction entered on the roll. If the judgment affect other lands than those purchased, and the creditor is willing to release those lands, retaining a lien on the other lands of his debtor, he may, it is apprehended, safely execute a release of those lands, or at all events give a covenant of indemnity to the purchaser not to molest him in the enjoyment of the lands purchased, without affecting his lien on the other lands of his debtor, for this is not like a condition or entire thing which cannot be divided, where the release of part operates as a release of the whole.

A moiety of the debtor's lands at the time of execution sued is the quantity which the creditor is entitled to take, and when he has taken one moiety his lien on the other half is discharged, so that the debtor can make a good title to that other moiety without the concurrence of the judgment creditor; still there may be other creditors for whose liens it may be necessary to provide.

The distinction between judgments signed and re-

corded, and indeed the lien created by judgments generally, as also the proper searches to be made respecting them, have been considered by the writer more at large in another work, to which he craves leave to refer <sup>P</sup>.

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2.---*Crown Debts.*

Securities and engagements to the crown bind the real estate of debtors, and also of their sureties in most cases, from the time when the security to the crown was given, or when the office or engagement in respect of which the debt has been contracted was acquired or entered into. The modes in which persons may become accountants to the crown are various and there are not at present any direct or adequate means of ascertaining that no such security, engagement or account is in existence; and there is generally such an absence of circumstances to excite suspicion of the liability to crown debts that search for them is seldom attempted <sup>q</sup>. However it is proper that the purchaser should be put on his guard with respect to crown debts, and wherever there is the least reason to suspect that the vendor is in any way connected with the crown or with a crown-accountant or debtor, a search should be instituted. In the absence of any such circumstances, the solicitor will, I apprehend, be justified, or at all events be held irresponsible for omitting to institute a search.

Receivers-general, sheriffs, stamp distributors, government contractors, tax collectors, auctioneers, parliamentary agents and commissioners, committees of lunatics, trustees of government hospitals, &c. are the more

prominent accountants to the crown, and dealings with them will of course excite direct enquiries as to crown debts. But it is to be remembered that only those debts create a lien which are of record<sup>r</sup>. The surety-bond which revenue accountants give on entering office, is at once recorded, and from the date of that record the lands of both principal and surety are bound; and if bonds of this kind are not in fact recorded, the statute 33 H. viii. c. 39, s. 2, has extended the lien of recorded crown debts to debts by bond and specialty. Simple contract crown debts do not create any lien till an extent issues, when of course they become in some sense recorded. It is requisite therefore to search the sheriff's office, as well as the exchequer rolls, to obtain complete indemnity against crown debts. And if the purchaser have notice of a simple contract crown debt, it seems from the judgment of Lord C. B. Macdonald in *Rex v. Smith* that he will be bound by it<sup>s</sup>. Notice therefore that the vendor is in arrear with his taxes, or that he is returned as a defaulter in the general schedule to the exchequer, should occasion a delay in completion of the contract till a discharge be obtained as pointed out by a late case<sup>t</sup>. But the purchaser has no occasion to search to fix himself with direct notice that the vendor is a defaulter. The lien created by the recognizance of a witness to appear at a trial is considered under the head 'Recognizance.'

Freehold estates are bound from the time the debt appears on record. Copyholds are not liable to crown debts<sup>u</sup>; for how can the king become a copyholder? Leaseholds are not bound till the *teste* of the writ of extent<sup>v</sup>; consequently a sale before that period will supersede the claim of the crown. Trust estates are

bound in the same way as legal estates<sup>w</sup>, and there is no way of defeating this lien by means of a power as before noticed in regard to judgments<sup>x</sup>. If however a debtor to the crown buys an estate and borrows part of the purchase money, which is secured by a term of years granted to the lender before the estate is conveyed to the purchaser, a person purchasing of the crown-debtor without notice of the crown-debt, and taking an assignment of the mortgage term to his own trustee in trust to attend the inheritance; the term in that case, never having been in the crown-debtor for an instant, is not subject to the crown-debt, and consequently the lien of the crown is entirely superseded by the precaution of keeping on foot this attendant term<sup>y</sup>. But where the crown-debtor had a freehold estate of inheritance, with a term outstanding in his own trustee in trust to attend the inheritance, and he having sold the estate conveyed it in the usual manner, assigning the term to another trustee in trust for the purchaser, still as the trust of the term had been once in him for his own benefit, it attached on the lands of the purchaser, who was consequently held liable to the crown-debt<sup>z</sup>.

The crown I apprehend will not release any particular estate sold by a crown-debtor without in some way impounding the purchase money. It is therefore unsafe to deal with a crown-debtor until he has procured and can produce his *quietus* discharging him from all liability to the crown<sup>a</sup>. It has been distinctly held that it is a sufficient objection to a title derived through a crown-debtor that his accounts with the exchequer do not appear settled<sup>b</sup>; and further that a person dealing with a crown-debtor without enquiry is bound by his debts<sup>c</sup>. A conveyance by the deputy remembrancer

under an extent and payment of the purchase money into court, completely exonerates the purchaser from all claims in respect of crown-debts generally <sup>d</sup>.

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3.---*Statutes.*

Statutes merchant and of the staple create a direct lien on the lands of the obligor, which can only be discharged by a release or acknowledgment of satisfaction by the cognizee.

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4.---*Recognizances.*

The acknowledgment of a debt before a judge in or out of court, or in or out of term, in any part of England, perfected by enrolment in some court of record, creates a lien on land in the same way as a judgment duly docketted; and which consequently can only be discharged by the same means. The recognizance of a witness to appear at a trial is a crown debt, but if the condition be performed it is defeated. If the condition be not performed, and the cognizor be returned a defaulter to the exchequer, a purchaser from him aware of the default would be clearly bound by the recognizance, but it may at all events be doubted whether such a debt can be considered as creating any lien on land till it is in some way formally entered on record in the court of exchequer or the party has direct notice of it. In that case the title cannot be safely accepted till the recognizance be regularly estreated.

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5.---*Lis Pendens.*

A suit in the court of chancery sometimes remains dormant for many years from a variety of causes, during

which time a purchaser from the defendant is presumed to have notice of the merits of the suit and will be held bound by the decree. It has been expressly holden that a suit in chancery is direct notice to all the world, and whoever purchases during the progress of the suit will by construction of equity, have notice of that suit and must abide by all its consequences; for otherwise the party might alien the land and baffle justice; moreover it prevents a trafic being made of litigated titles<sup>e</sup>. A decree not acted on is not notice<sup>f</sup>, but if a decree be appealed against, that is a continuation of the suit and a *lis pendens*, by which a purchaser will be bound<sup>g</sup>.

The consequences of this doctrine are truly alarming, for it is seldom that a purchaser thinks of searching for suits in chancery without some direct hint of the existence of proceedings; and I apprehend the solicitor of the purchaser would not be held responsible for an omission to search the rolls of the court of chancery if there was nothing to lead him to that course. And this doctrine of a *lis pendens* is the more frightful as it deprives the purchaser of the protection of attendant terms and other guards which he may have been advised to rely on as an indemnity against incumbrances; for the suit being direct notice, he is presumed conusant of it, and so it cannot be said that he is a purchaser *without notice*—the very ingredient requisite to give a protecting quality to his attendant term.

The proper place to search for suits depending is the seal office of the court of chancery and the pleas office in the court of exchequer. If any suit be found, there is of course no other means of steering clear of it than by waiting for the decree. Even a collusive suit, which

may not in fact be binding, must necessarily delay the completion of the contract, for it remains undecided whether it is conclusive till the decree is pronounced. Whenever a purchaser has notice of a decree or a suit, it is necessary that he be apprised of its merits ; he should therefore call for an abstract of the proceedings, to be assured they contain the affirmance of no hostile charge nor the admission of any prejudicial acknowledgment.

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6.---*Warrant of Attorney.*

Warrants of attorney create no lien on land, and they are no further applicable to the subject of the present essay than as a discovery of their existence affording the purchaser a warning as to the solvency and general credit of the party with whom he is dealing. By statutes 3 Geo. iv. c. 39, and 3 Geo. iv. c. 57, all warrants of attorney are required to be filed within twenty-one days at the warrant of attorney office to be valid in a subsequent bankruptcy or insolvency. The discovery of an instrument of this description is no objection to the title unless it clearly appear to constitute an act of bankruptcy, which the circumstances alone can dictate.

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7.---*Cognovit.*

Neither does a cognovit create any lien on land. It is a simple acknowledgment of the debt or right of action, and requires no stamp, unless it contain an agreement ; as, to discharge the obligation by instalments <sup>h</sup>.

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8.---*Bonds.*

Bonds and specialty debts under seal create no lien on the lands of the debtor during his life time, and he



may sell and dispose of them without any obligation on the purchaser to make enquiries concerning their existence or extent. But on the obligor's death, the lands may be followed in the hands of a purchaser from the debtor's heir or devisee, if at the time of the purchase an action were commenced by the bond or specialty creditor. It therefore behoves a purchaser from the heir or devisee to enquire and search for writs against the seller though I believe this is seldom, if ever, done.

By the common law the creditor could pursue the heir if he were specially named in the obligation, and if the lands were not sold by him before the action brought he could attach the lands. If however the heir made a *bona fide* sale of the land before an action was commenced, he could plead *reins per descent*, and the creditor could not then follow the lands in the hands of a *bona fide* purchaser even with notice. Further, if the debtor devised the estate away from the heir, the heir could on an action brought against him by the creditor plead *reins per descent*, and as the devisee neither was nor could be bound, the creditor had no remedy against him.

This inconvenience was partially remedied by an act passed in the reign of William and Mary (A. D. 1691), against fraudulent devisees<sup>i</sup>; but this act and several others on the same subject have lately been repealed or rather consolidated in one act, whereby it is declared<sup>j</sup>, that all wills made by any tenant in fee simple shall be void as against [or rather in favor of] persons with whom he shall have entered into any bond, covenant, or other specialty binding his heirs, and that the creditor may maintain his action of debt or covenant<sup>k</sup> against the heir and devisee jointly or if there be no heir against

the devisee alone notwithstanding any such devise<sup>1</sup>. This of course does not vary the common law remedy against the heir where there is no will. But it is provided that if the heir or devisee make a *bona fide* alienation of the land before an action brought, the creditor shall not be at liberty to pursue the lands in the hands of the purchaser; but the heir and devisee are made liable in debt or covenant, to the value of the lands sold aliened or made over; in which case all the creditors are to be preferred as in actions against executors and administrators<sup>m</sup>.

Hence creditors by bond and specialty, though they have no lien on their debtor's lands in his life-time, can follow those lands on his death if they sue for the recovery of their debts immediately on his decease, but otherwise they run the risk of losing that privilege by a *bona fide* sale; then the creditor has the personal security of the heir or devisee to the value of the lands devised, and such heir or devisee cannot afterwards plead *reins per descent*. Upon this act it is merely necessary to observe that the remedy is not, as on a judgment, for one half of the lands but for the whole, and that a judgment creditor may take the benefit of this act; for his debt is by specialty and more, viz. by record.

Of course where a lien of this kind has attached, the concurrence of the creditor, or a separate release or receipt by him, are the only means of discharging the incumbrance.

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9.---Simple Contract Debts.

As to simple contract debts, promissory notes, and debts secured by agreement in writing not under seal,

the creditor has no remedy against the lands of his debtor in his life time, nor against his heir or devisee after his death, unless, *first*, the debtor has by a will charged his lands with, or expressly devised them for payment of his debts; in which case any simple contract creditor may by filing a bill in equity, called 'a creditor's suit,' obtain an equitable administration of the assets of his debtor, of which his estate thus expressly devised or charged with debts will form part; and where an estate is so devised or charged generally with or for payment of debts, it is a settled rule, that simple contract creditors are entitled in equal degree with creditors by specialty, and if the specialty creditors have exhausted the personal estate, they will be allowed no benefit from the real estate thus constituted equitable assets, unless they will agree to share the whole fund with the simple contract creditors *pari passu* <sup>n</sup>. Or unless *secondly*, the debtor be a trader within the meaning of the laws relating to bankrupts. In that case the estates of such persons not expressly charged with or devised by them for payment of their debts, are by the lastly mentioned act <sup>o</sup> made assets to be administered in courts of equity for the payment of all just debts of such trader, as well debts due on simple contract as on specialty. But creditors by specialty in which heirs are bound, are to be preferred to creditors by simple contract or by specialty in which heirs are not bound.

If therefore the deceased be a trader, his heir or devisee cannot make a clear title to lands derived from him without shewing that his assets have been completely administered. This at all events cannot be done until the expiration of the executor's year, and some

admission or acknowledgment on the part of the executor that he has duly advertised the estate and that no claimants appear, or that they have been all satisfied, or that the executorship has been otherwise wound up and settled and the legacies paid, should seem to be essential to secure the purchaser against creditor's suits where there is no devise for or charge of debts. A charge of debts generally exempts the purchaser from seeing to the application of his purchase-money, but then the sale is by the trustees or executors and not by the devisee or heir claiming beneficially; so that it is only where a trader omits to charge his lands with his debts that precautions of this kind are necessary.—Evidence of the payment of a legacy is generally considered good proof of the discharge of the debts, but this is only presumptive evidence, and may be rebutted by shewing the existence of debts.

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10.---*Bankruptcy.*

By the old doctrine of relation, the moment a trader committed an act of bankruptcy he was deprived of the power of making any valid disposition of his property; the conveyance executed by the commissioners vested in the assignees all his estate and effects from the time of the act committed. The consequence was that all alienations and dispositions by the bankrupt in the interval were absolutely null and void; for the assignees were bound in duty to resell the property for the benefit of the creditors. It was therefore dangerous to purchase an estate from a trader, for it was impossible to know what his real circumstances were or to be assured that he had not committed a secret act of bankruptcy

upon which a commission might issue and avoid the purchase. Various statutory provisions were made from time to time limiting the period within which this doctrine of relation should operate, and after several alterations, it is now provided that all conveyances by any bankrupt made *bona fide*, more than two calendar months before the issuing of the commission, shall be valid notwithstanding any prior act of bankruptcy by him committed, provided the person taking such conveyance had not at the time notice of *any* prior act of bankruptcy <sup>p</sup>.

These latter words must mean *any* prior act of bankruptcy *subsequent* to the petitioning creditor's debt, for the relation to the act of bankruptcy cannot be carried back beyond the accruer of that demand <sup>q</sup>. S. Romilly's acts <sup>r</sup> declared that notice of the bankrupt's *insolvency* should deprive the purchaser of the benefit of the two months acquiescence. That declaration is omitted in the present act, so that a knowledge of the vendor's insolvency is not enough to defeat his conveyance, if the purchaser cannot be proved to have had by that or other means, actual or constructive notice of the default in payment on which the commission issues. Notice of an act of bankruptcy prior to the act whereon the commission is founded cannot be prejudicial to the purchaser, for the relation is only to that act by the old law. Notice that the vendor has stopped payment without notice that he has absconded in fear of arrest or otherwise denied himself, is not a notice within the present act. So notice of a concerted act of bankruptcy is immaterial, as the commission founded on it will be superseded <sup>s</sup>. So remaining abroad is not an act of bankruptcy if the departure were not with intent to de-

feat creditors<sup>t</sup>, and that though the party be subsequently outlawed<sup>a</sup>.

Lying in prison twenty-one days is an act of bankruptcy relating to the arrest<sup>v</sup>, *which*, consequently must be treated as an act of bankruptcy unless the party be liberated by means of the purchase-money or otherwise on the twentieth day. Taking a conveyance from a trader in prison and seeing the purchase-money applied in the discharge of the detaining creditor's demand, will not therefore be liable to much objection if twenty-one days have not elapsed from the arrest.

With respect to composition deeds, the fourth section of the present act (6 Geo. iv. c. 16,) provides, that where any trader shall execute any conveyance or assignment, by deed, to a trustee or trustees, of all his estate and effects for the benefit of all his creditors, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within *six calendar months* from the execution thereof by such trader; provided that such deed shall be executed by every such trustee within fifteen days after the execution thereof by the said trader; and that the execution by such trader and by every such trustee be attested by an attorney or solicitor; and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London or within forty miles thereof, in the London Gazette, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the London Gazette, and also in one London daily newspaper and one provincial newspaper published near to such trader's residence; and such notice shall contain

the date and execution of such deed, and the name and place of abode respectively of every such trustee and of such attorney or solicitor.

An assignment of part of a trader's effects to a particular creditor, or in trust for all his creditors who shall execute the deed, is not in itself an act of bankruptcy, but if it be done with intent to give a fraudulent preference over other creditors, it is against the policy of the bankrupt law, and therefore void as against assignees under a subsequent commission. It is for a jury to decide on the intent, which they can collect and presume only from the circumstances. It is however obvious that the presumption is against such a transaction, and it will require strong corroborative circumstances to support an instrument of this kind. A mortgage also of *all* a trader's effects is an act of bankruptcy and void against a subsequent commission, unless the provisions of the lastly mentioned section have been duly complied with ".

In regard to constructive notice the 83rd section of the present bankrupt act (6 Geo. iv. c. 16) declares that 'the issuing of a commission shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing of the commission), if the adjudication of the person or persons against whom such commission has issued shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same.'—The words 'issuing a commission' cannot allude to commissions generally, for then a commission issued within three months after the conveyance would constructively give

the purchaser notice of the act of bankruptcy, which, if prior to his conveyance, would invalidate his purchase, for he would not then be a purchaser without notice within the concluding proviso of the 81st section. The object was to give a more popular effect to the doctrine of notice than that arising from former statutes. By the 46 Geo. iii., striking a docket was declared notice, and by Sir S. Romilly's act 49 Geo. iii., it was provided that the issuing a commission should be deemed notice of an act of bankruptcy. But independent of that act, it was considered, that a commission of bankruptcy was not in itself notice to a purchaser. Striking a docket or issuing a commission are in themselves insufficiently notorious for notice to all the world, and it was therefore with a view to give this notice greater publicity that the 83rd section was introduced. It is in fact a modification of a similar section in Sir S. Romilly's act, which relates exclusively to the subject of the 81st section. The 83rd section was therefore meant as a tally to the two preceding sections with which it stands so closely connected.

This further protection is afforded by the present act, that if the purchaser has actual notice of an act of bankruptcy, his title cannot be impeached after twelve months if a commission does not issue within that time. By the statute of James the period was five years. The 86th section of the present act declares, that no purchase from any bankrupt *bona fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months



after such act of bankruptcy committed.—This section cannot be construed to mean negatively, that where the purchaser has not notice, that his purchase shall be open to enquiry indefinitely; for the clause is manifestly intended to quiet and confirm titles not impeached by a commission within a twelvemonth, rather than expose them to cavil and objection.

These sections afford a complete answer to most of the questions which were agitated in the profession before the passing of the act, but they give rise to some others of a perplexing character. The object however of the act was clearly to assist, certainly not to retard the alienation of property, and dealings with traders may now be completed with the single risk of a secret act of bankruptcy on which a commission issues within two months after the conclusion of the treaty. To impound the purchase money in expectation of such an event would be a conditional purchase, and the conveyance could not be considered as complete till within two months after payment of the purchase money.

The precautions necessary on completing a purchase with a trader are, to search the bankrupt or gazette office during the last two months for declarations of insolvency by the vendor; for such voluntary declarations are acts of bankruptcy under certain restrictions, and the advertisement in the gazette is constructive notice to the purchaser<sup>2</sup>. Of course if the purchaser has notice of an act of bankruptcy, he cannot safely complete his contract, as he would not be free from risk for a twelvemonth afterwards. It has been distinctly holden that an act of bankruptcy is a valid objection to a title without shewing a debt upon which a commis-

sion could issue<sup>v</sup>. An affidavit by the vendor that he owes no debt upon which a commission could issue, is a fragile security; it may at all events be questioned whether such a voluntary affidavit would support an action for perjury, and if it would, the result of such an action would probably afford the purchaser no sufficient indemnity.

With respect to the protection afforded by an attendant term or other outstanding legal estate, it is clear that a purchaser without notice may avail himself of such legal estate created prior to the act of bankruptcy, though a commission issue within two months after his purchase<sup>z</sup>. If an act of bankruptcy be committed to-day; a mortgage for a term of 1000 years executed by the bankrupt to-morrow, and no commission issued for more than two months after the mortgage, the mortgage, it is clear, will be binding on the assignees of the bankrupt mortgagor. Let us further suppose, that two months and a day elapse between the mortgage and the commission, and in the interval the bankrupt to sell his equity of redemption to A. (which sale would be clearly void as against the assignees), and afterwards A. to purchase in the prior mortgage, it is generally agreed on the authority of the above case, that A. may make use of the legal estate thus acquired as a defence against the assignees, on the rule in equity, that a purchaser for a valuable consideration without notice shall not be deprived of any advantage which he may derive from the legal estate at law. It cannot, however escape observation, that in the case where A. purchases the equity of redemption in the two months interval between the mortgage and commission, he will be a purchaser with notice of a prior act of bankruptcy; for

the issuing the commission before two months have elapsed will, as to that purchase, affect him with notice of the prior act of bankruptcy.

With respect to purchases from assignees of bankrupt, it may not be altogether misplaced to observe here, though this chapter purports to treat on incumbances only, that they are under the same obligation to deduce a good title as other vendors<sup>a</sup>. But if they plainly neglect their duty to the creditors in the contract they enter into, such contract cannot be enforced by the purchaser<sup>b</sup>. Any variation in the contract, such as an abatement for a defect, could not be satisfactorily made without the assent of the creditors at a meeting duly convened for that purpose (in which case the purchaser should require a copy of the resolutions passed at that meeting); for the proper course in such case is a resale, which as part of the general duty of the assignees may be effected without any previous assent. But a sale by private contract should seem to require the sanction of the creditors; and in all cases where the assent of the creditors is necessary, the purchaser should be furnished with some evidence of such assent.

The purchaser, of course is involved in the validity of the commission, which, if the bankrupt disputes, he will have to prove as part of his title. This is the reason why the concurrence of the bankrupt is usually required. If the bankrupt joins, the enrolment of the proceedings in the bankrupt office is generally dispensed with; and I apprehend the purchaser cannot reject that common practice and insist on the enrolment of the proceedings if his title can be pronounced complete in either alternative. This opinion however

is not uniformly adopted, for it is said that the invalidity of the commission may let in third parties. If the commission be superseded and a second commission issued within due time, the assignees under that commission may have a preferable and hostile title to the purchaser, but a supersedeas is not prevented by enrolment of the proceedings, and that consideration can in fact have little or no application to the question. Moreover it is observable that the practice is incidentally confirmed by the 78th section of the bankrupt act, which authorises 'the Lord Chancellor, upon the petition of the assignees, or of any purchaser from them of any part of the bankrupt's estate, if such bankrupt shall not try the validity of the commission, or if there shall have been a verdict at law establishing its validity, to order the bankrupt to join in any conveyance of such estate, or any part thereof; and if he shall not execute such conveyance within the time directed by the order, such bankrupt, and all persons claiming under him, shall be stopped from objecting to the validity of such conveyance; and all estate, right, or title which such bankrupt had therein shall be as effectually barred by such order, as if such conveyance had been executed by him.' The bankrupt will not be ordered to convey on the ground of his having been nonsuited in an action brought by him to try the validity of the commission, if a second action is pending<sup>c</sup>, nor, if he will undertake to bring another action: in this case the petition was ordered to stand over, in order to await the result of such action<sup>d</sup>.

If the bankrupt does not join, then the title must be derived through the commission, and the 96th section declares that no *commission* of bankruptcy, *adjudication*

of bankruptcy by the commissioners, or assignment of personal estate, shall be received in evidence, unless the same shall have been entered of record in the bankrupt office. The bankrupt's real estate is conveyed by *bargain and sale*, which requires enrolment in the usual way. It was therefore deemed unnecessary to require the registration of the bargain and sale in the bankrupt office. The marginal note, however, of the act seems to imply that it was so intended, but it certainly is not required in the body of the act. The marginal note runs thus:—No commission, adjudication, *conveyance* or certificate to be received in evidence, unless entered of record. The provisional assignment of course requires enrolment in the bankrupt office.

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11.---*Insolvency.*

The real and personal estates of the insolvent are under his command till he signs his petition for discharge. He may therefore sell and dispose of his property in prison in the same way as if he were not under confinement; and the estate sold cannot be followed in the hands of a *bona fide* purchaser unless it be made on the eve of presenting his petition and with a view to defraud his creditors. If he remain under arrest twenty-one days, *that* is an act of bankruptcy, and it would be unsafe to deal with him, if a trader; and there are few cases in which a jury would not presume fraud, where there is not a full, fair and *bona fide* sale with a view to his release; in evidence of which, it would require to be shewn that the purchase money was applied in liquidation of the detaining creditors demand. A sale to a creditor, (particularly if not the detaining one) after

the twenty-one days would doubtless be held a fraudulent preference, and a sale in prison under any circumstances must necessarily create considerable anxiety to the purchaser ; for the court would scarcely dismiss the insolvent's petition however flagrant the case, as that would only be a confirmation of the fraud, at the expense of the creditors—the insolvent's perpetual imprisonment being of no advantage to them. The court will ultimately allow the petition, and leave the assignee and creditors to impeach the sale on circumstances which induce the least presumption of unfair dealing. Indeed it may be stated generally, that where property is fraudulently made away with, charged, or mortgaged, the person receiving such property, or accepting such charge, or mortgage, cannot legally hold it ; the fraud vitiates the sale, delivery, charge, or mortgage ; and it should seem the duty of the assignee, in a case where the court adjudicates that an insolvent has fraudulently made away with, or charged, or mortgaged any property, to call a meeting and take the sense of the creditors on the propriety of instituting proceedings against the person holding the property for its recovery.

By the sixth rule of the insolvent court, every insolvent is required to leave with his petition for discharge a duplicate account in writing signed by himself, and attested by the officer or other person who shall attest the petition, of all his real and personal estate and effects then in his possession or under his control, in order that it may be ascertained and given up to the provisional assignee. By the 32 Geo. ii. c. 28. s. 17, (repealed by the present act) the insolvent was required to deliver in on oath a true and just account of all his real

and personal estate; that clause appears to be omitted in the present act, but in lieu thereof, it is declared that the wilful omission of any of the insolvent's 'effects or property' in his schedule shall subject him to three years imprisonment, 7 Geo. iv. c. 57. s. 70.—This of course can only include the purchase money in the case above supposed, and not the estate itself, which has been sold and conveyed away to a *bona fide* purchaser, and there is certainly no further obligation on the part of the purchaser to see to the application of his money that the liability of review above alluded to.

By the 11th section of the present insolvent act, 7 Geo. iv. c. 57, it is declared that every prisoner petitioning for his discharge shall at the time of subscribing his petition, duly execute a conveyance and assignment to the provisional assignee of the insolvent court, of all his estate, right, title, interest, and trust in and to all his real and personal estate and effects generally, and not merely of the property mentioned in his schedule; provided that if the petition be dismissed such conveyance and assignment shall be void. The doctrine of relation therefore so characteristic in bankruptcy, has no application to insolvency; and in other respects there is a considerable difference in the operation of the two acts. Under the bankrupt act the commissioners take no estate. They have barely a power, and until the execution of that power the estate remains in the bankrupt. Under the insolvent act, the object appears to be to divest the insolvent of all his estate before his petition can be entertained. Under the bankrupt act the bankrupt does nothing. Under the insolvent act the debtor himself makes the assignment. He cannot therefore gainsay his own conveyance, except in the event of his

not obtaining his discharge ; in which case the assignment by the express provisions of the act, is declared to be void<sup>e</sup>. The concurrence of the insolvent therefore in a conveyance by his assignee cannot be essential.

By the 32nd section of the present act 7 Geo. iv. c. 57. it is declared ‘ that if any prisoner who shall file his petition for discharge shall, before or after his or her imprisonment, being in insolvent circumstances, *voluntarily* convey, assign, transfer, charge, deliver, or make over any estate real or personal, goods, or effects whatsoever, to any creditor, or to any person in trust for any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void, as against the provisional or other assignee or assignees of such prisoner appointed under this act: provided always, that no such conveyance, assignment, transfer, charge, delivery or making over, shall be so deemed fraudulent and void, unless made within *three months* before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said court for his or her discharge from custody under this act.’ This clause does not avoid a *bona fide* sale even with notice of the insolvency. It relates entirely to a voluntarily and fraudulent preference of creditors. If the assignment take place under circumstances which might reasonably lead the creditor to believe that the benefit of the act is in contemplation, that will be sufficient to invalidate the transaction. The assignment however must be made with a view of giving a particular creditor *preference*. A payment in the course of business will therefore be good. It



must also be *voluntary* to render it void. If the assignment be made in consequence or under an apprehension of legal process, or even through the importunity of the creditor (unless the assignment be of all his effects), or under any other circumstances sufficient to overcome the free will of the debtor at the time, the assignees will not be entitled to recover, but there can be little doubt that a jury would declare ninety-nine out of a hundred cases of this kind fraudulent and void <sup>f</sup>.

The case most likely to entrap a purchaser and the one which suggests precautions in regard to insolvency generally, is where a person omits to insert in his schedule a right or title to an estate or sum of money in the funds to which he is entitled in reversion or expectancy, and neither his assignees or creditors discover the omission. Then, when the insolvent has recovered in some degree from the shock of his discharge, by removal of residence or otherwise, he may, and in practice he has often been detected in taking that right or title to market and selling it for a valuable consideration. Neither the purchaser nor his solicitor may have the slightest reason to suspect an assignment some year or two before to the insolvent assignees. If the purchase be completed and the assignees or creditors by any chance become acquainted with the circumstances, the title of the purchaser may be entirely subverted, and therefore it may be essential in cases where the greatest respectability is not apparent or the vendor is not well known, to institute a search in the insolvent court for names similar to the vendor's for the last five or ten years. A certificated bankrupt has not the same opportunity of committing such a fraud, as the bankruptcy is more general and notorious, and the punish-

ment for concealment more severe, still it behoves purchasers in buying reversions to be always on their guard.

It may occur that the assets of the debtor prove sufficient to satisfy the demands of his creditors; in that case a title cannot be made without the concurrence of the insolvent's assignees; for all his estate has been assigned and conveyed to them. When a provisional assignee is appointed, there is no form in any of the insolvent acts prescribing the mode of conveyance from him to the general assignee; the common and ordinary form by lease and release or its equivalent should therefore seem to be requisite for the transfer of the insolvent's freehold estates; but the statutory form prescribed for the *assignment* to the provisional assignee was always used by the officers of the court, which in terms is obviously inadequate to the conveyance of estates of inheritance. Difficulties on this head led to the enactment 1 Wm. iv. c. 38, (1830), which prescribes a simple form of conveyance for future use, and declares that all conveyances and assignments theretofore made by the provisional assignee shall be good and valid. The 5th section is applicable to cases where from non-appointment of general assignees or some other cause of that kind a title is considered defective. It recites that "whereas it may often happen that some interest in lands and tenements may become vested in the provisional assignee of the insolvent which happens to be of no value to creditors; but, nevertheless it may be reasonable and expedient that the said provisional assignee should make, or join in making some conveyance or assignment of the same, and that the same should be done without the expense attending the advertisements and meetings

of creditors, as prescribed by the first mentioned act, in certain cases ; it is therefore enacted, that it shall and may be lawful for the said court, at any time after the day gazetted for the hearing of the matters of the petition of any insolvent debtor, if no creditor shall have become assignee of his or her estate or effects ; and if it shall appear fit, upon such notice given by advertisement or otherwise to the creditors, or any of them, as the said court shall in any case direct, to order the provisional assignee to make or join in any conveyance or assignment of any such interest as to the said court may appear just and reasonable, without observing the provisions of the said first-mentioned act as to the sale of real property by the provisional or other assignees of the estates of insolvent debtors."—This seems confined to the provisional assignee, but the general assignee is clearly within the spirit of the act, and by no great stretch may be ordered to convey under similar circumstances.

In titles derived through assignees of insolvent debtors, it is necessary to prove the insolvent's discharge, for on that depends the validity of the vendor's title.—A paper purporting to be a copy of the original discharge and signed by the clerk of the proper officer of the court, with the impression of the seal affixed to it, has been held good evidence of the discharge without producing the certificate, or proof of its being an examined or attested copy<sup>s</sup>. The certificate belongs to the insolvent and cannot always be produced, in which case it can only be supplied by some official evidence of the description just alluded to. If the insolvent joins in the conveyance this evidence may be dispensed with ; his concurrence alone necessarily raises the presump-

tion of his discharge, which is indeed generally recited in terms, and will thus be fully acknowledged. It has lately been held that the insolvent's *petition* does not form a necessary part of the assignees' title <sup>h</sup>, though in some cases it appears to have been held otherwise <sup>i</sup>. The insolvent's wife, if any, may be entitled to dower; but the judgment entered up against him on his discharge can of course create no lien on his estates in the hands of the assignees as they are in by prior conveyance.

It may not be amiss to subjoin, that the act requires the sale of all the insolvent's *real estates* to be by public auction <sup>j</sup>; but these words have lately been held not to include leaseholds <sup>k</sup>. A sale by private contract if sanctioned by the creditors and affirmed by the insolvent court would not perhaps be objectionable; nevertheless it is a departure from the act, and a question may be raised upon it, which a cautious purchaser would not willingly incur.

It is also observable that the insolvent act is not so effective as the bankrupt act in regard to *estates tail* and remainders. It passes all the interest of the insolvent but not of his issue. The words indeed are very comprehensive *all the estates* of the insolvent, but can the estate tail be said to be *his* when the issue claim by title paramount and not by or through him, and there is no clause in the act compelling the insolvent to levy a fine or suffer a recovery for the purpose of giving the creditors all the benefit he may himself acquire.

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12.---*Composition Deeds.*

A good and valid title may be derived from trustees of a composition deed published and perfected pursuant

to the requisitions of the 4th section of the bankrupt act, noticed before (p. 245); but under trust deeds not so perfected, (and as it is generally ungrateful to the parties to have their difficulties published, few deeds of this kind are rendered public and valid,) a satisfactory title cannot be made; for the trust deed itself is an act of bankruptcy and gives notice of an actual defect; and no one would readily accept a title from the trader himself after notice of his general insolvency by a composition with his creditors. Instruments of this kind seldom work well, particularly when not made under the sanction of public advertisement, as the debtors have then the means of suppressing debts and thereby rendering the deed, void by express provision. If all the creditors sign, no risk may be run<sup>1</sup>, but how is it possible to raise even a presumption that every creditor has executed the deed?

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13.---*Dower.—Curtesy.*

The famous statute of Magna Charta granted by King John, A. D. 1215, established the widow's right to dower as it now stands. On the 23rd of August, 1831, a bill was ordered to be printed by the House of Commons wherein it is proposed to be enacted in future, 'that no widow shall be entitled to dower out of any land which her husband shall have absolutely disposed of in his life-time or by his will;' so that the solicitude displayed on all hands to bar the wife of her dower is it seems about to be finally accomplished. The gallantry or justice of depriving the unprotected and unrepresented widow of a vested right, established on the concurring consent of at least six centuries, will not es-

cape observation. The object no doubt is to dispense with the common uses to bar dower, but since the adjudication respecting the avoidance of judgments by means of powers, those uses will continue in practice notwithstanding a reformed parliament should on the advice of the Real Property Commissioners adopt the measure.

The purchaser's liability to this incumbrance is well stated by Sir A. Hart, Lord Chan. of Ireland, in a late case, 'a person' he observes 'who purchases an estate of inheritance from a married man, has notice that the vendor's wife may have a claim to dower; and therefore, if he negligently omit to take a fine, or does not use common diligence to ascertain and preserve evidence that a jointure, if any, has been settled upon her, equity will grant him no relief as against the wife. Any person purchasing from a husband will be protected in equity from the wife's claim to dower, *if there be a contract, although it may not amount to a legal release of the right.* But a purchaser to entitle himself to such protection, must not only show that the wife made some contract on the subject of her dower, but must prove the contents of that contract: he cannot be compelled to complete his purchase, unless he has either a fine from her, or such evidence of the contract as will enable him at any time to lay his hand upon it, to repel any future claim of this right<sup>m</sup>. By the word *contract* here must mean an ante-nuptial agreement for an equitable jointure; for it is clear that a married woman cannot enter into a valid contract after marriage except by fine or recovery.

The mode of releasing the incumbrance of dower in

the husband's life-time, is as above noticed, by the wife's concurrence in some assurance of record as a fine or recovery, or bargain and sale enrolled according to the custom of some boroughs. After the husband's death and before entry, the wife may release her right without resorting to a deed which operates by delivery of seisin. *After* entry, the proper mode of conveyance to the person immediately in reversion is a surrender; and to a stranger a feoffment, or any other mode of conveyance by which a freehold estate may be transferred.

*Curtesy* can scarcely be called an incumbrance, it is an estate in possession; for when consummate it is rather a continuation of the husband's marital right than a new interest.

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14.---*Mortgages.*

Mortgages are incumbrances of the first degree, and are usually abstracted in chief. As to second and third mortgages which are not abstracted, and of which the purchaser has neither actual or constructive notice, he will be entirely protected against them, if he obtains the legal fee and the deeds. His principal concern therefore should be to obtain the legal estate and the deeds, and to avoid notice. The latter point is by far the more difficult of attainment, as notice to the mortgagee or any of his agents is considered equally binding with notice to the purchaser, his solicitor, or agents. This doctrine is peculiarly harsh and ungrateful, and has not failed to excite the marked animadversion of the sitting commission. It has not been in terms decided that constructive notice to the

mortgagee's solicitor's town agent shall operate as direct and conclusive notice to the purchaser, and it will admit of consideration, in a case peculiarly distressing, whether that point should not be brought distinctly before a court of equity, supposing the remedy suggested for its relief,—a general registry, should be long delayed or should not be ultimately adopted.

If the first mortgagee leaves the deeds in the hands of the mortgagor, there are few cases in which that circumstance would not have the effect of postponing his security to a subsequent incumbrancer who has obtained the deeds. It has been expressly adjudged that title-deeds are the criterion of property in the land, and not to take them on a sale or mortgage is gross neglect which no court will rectify<sup>n</sup>. As to *parting* with the deeds without payment of the mortgage money, Lord Eldon after a review of the authorities on this subject in 1801, observed that the doctrine at last came to this, that the mere circumstance of parting with the title-deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence which amounts to evidence of a fraudulent intention, *that* in itself is not a sufficient ground for postponing the first mortgagee<sup>o</sup>; and this doctrine was acted on in 1819, by the present Master of the Rolls then V. C. P. The subject is understood to be still before the court of chancery in more shapes than one.

As to mortgages of which the purchaser has notice, he will not of course conclude his purchase without applying his money in their satisfaction and obtaining the concurrence of the mortgagees in his conveyance.—



Old mortgages may be safely presumed satisfied after a lapse of thirty or forty years, that is, the money on them may be presumed paid, if it appear that the mortgagor has been in undisturbed possession for more than twenty years, but in less than the above mentioned period, a purchaser cannot be assured that the outstanding legal estate is a mere empty trust not bearing fruits. If it appear that the money has been paid, or a fair presumption be raised on that head, the term also may be presumed surrendered, if there has been several changes of ownership in the interval and no notice has been taken of it.

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15.---*Annuities.*

It has been said that an annuitant is not entitled to the custody of the title deeds<sup>q</sup>, but that refers to a bare annuitant who has no direct estate in the land in security of his annuity. As to such, the title can be traced only through the deed or will creating it, and its discharge must be proved in the same way as the release of any other legacy or portion, and the term, if any created for its support, should be assigned to attend the inheritance. The period within which an annuity of this kind may be presumed satisfied, must depend on the life for which it is granted. If it is fair to presume in the natural course of things that the annuitant is dead, the want of a certificate of burial (which is of course the more certain and direct evidence of the fact) cannot be considered as an insuperable objection to the title, but no case has occurred in which such a presumption has been made in less than thirty years<sup>r</sup>.

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Life annuities granted on the advance of money are similar in many respects to mortgages. As an incumbrance, they are clearly in that character, and their priority is determined in the same way. The annuity enrolment office is of little avail to the purchaser; full one half of the annuities granted, do not by express provision of the act require enrolment; and as to those which are enrolled, the memorial affords no particular information of the lands charged. The purchaser is clearly not bound to search for annuities, as they do not simply by enrolment create any lien on the land, if they are not otherwise expressly charged thereon. Neither is the register itself constructive notice of the existence of annuities, but if the purchaser institutes inquiry, he will be presumed acquainted with all memorials falling within the period of his search. Then as to annuities and other incumbrances of which he has notice, he cannot safely complete his contract without their release, or the concurrence of the incumbrancer in his conveyance.

But though search for annuities be not essential to the purchaser's safety as far as regards the annuity, yet it is to be remembered that in practice, life annuities are seldom purchased without the collateral security of a judgment. The lien of that judgment attaching on the legal estate cannot of course be evaded, supposing it duly docketted; but if the mortgage be of sufficient standing to raise a fair presumption that it is the prior incumbrance, or there be an attendant term of sufficient antiquity, it would be imprudent to run the risk of acquiring direct notice of a judgment by searching for annuities. If there be neither mortgage nor term, and the judgment, if any, would attach on the

legal estate, it may then be proper, if any suspicion dictates such a course, to search the annuity enrolment office for incumbrances of this kind, against which it is to be remembered, possession of the deeds will not alone afford security.

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16.---*Legacies.*

By the legacy act it is declared that no written receipt or discharge for any legacy or part of any legacy, or for the residue of any personal estate, or any part of such residue, in respect whereof any duty is thereby imposed, shall be received in evidence, or be available in any manner whatever, unless the same shall be stamped, as required by that act; and no evidence whatsoever shall be given of any payment, satisfaction, or discharge whatsoever, or of any release or composition of such legacy, or any part thereof, without producing such receipt or discharge, duly stamped as aforesaid, unless the actual payment of the duty thereby imposed shall be first given in evidence: provided always, that a copy of the entry in the books of the Commissioners of the stamps, of the payment of such duty, shall be admitted as evidence thereof: 36 Geo. iii. c. 52. s. 27.

When legacies are charged on land and there is no express or implied indemnity to purchasers, a general release of the legacy is the usual evidence of the discharge of this incumbrance; but whether a purchaser has a right to insist on production or copy of the legacy receipt (which clearly is the only admissible evidence in court) is a point to be settled by a true construction

of the legacy act, and upon that construction opinions may vary. The words rendering a written release or discharge unavailable in any manner *whatever*, allow the releasor an opportunity of gain-saying his own *release*. But may not the purchaser treat the release as an assignment or conveyance of all the legatee's interest in the land, for which the release on a proper deed stamp would, I should think, be available evidence, for it is tendered not as a discharge but as a continuation of an existing lien. This consideration induces the precaution of inserting words of conveyance or assignment in the release of a legacy.

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17.---*Portions.*

These are created by settlement and are invariably secured by a term ; till which term is duly assigned to attend the inheritance or becomes attendant by irresistible presumption, the portion cannot be treated as satisfied. A release by the portionist when of age, is of course the proper evidence in discharge of incumbrances of this sort, which involves evidence of the legitimacy and sometimes of the identity of the releasor to shew that he is the proper party.

It is not exactly settled what time will induce the presumption of the discharge or satisfaction of legacies and portions. After twenty, certainly after thirty years, the presumption of a discharge arises, but that may be rebutted by circumstances, and in very few cases can portions or legacies less than forty years old be treated as satisfied without enquiry. When a case arises in which it is fair to say that a jury would presume satisfaction of the portions, the court of chancery will without a

reference to a jury make that presumption, and presume the term surrendered or merged as the case may require<sup>2</sup>.

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18.---*Rents.*

A fee farm, quit, or other perpetual rent is an objection to the title, and the purchaser can claim an abatement in respect of it. He is not bound to accept an indemnity, the difficulty of which is to make it effectual. On the enfranchisement of copyhold lands, *quit-rents* are often reserved, which are in fact binding on the land by the covenant to pay, but the existence of such a rent does not in itself imply a *tenure*, as the land by the enfranchisement is made socage.

Where a quit-rent was claimed by a lord of the manor, proof by the tenant that no demand had been made upon him for thirty-four years, was held not to be a sufficient ground for presuming a release or extinguishment, and it was said that no presumption could be raised within less than fifty years, which is the period fixed by the statute of limitations, 32 Hen viii. c. 4, s. 4, because for the extinguishment of a rent charge, a deed is necessary<sup>3</sup>. Formerly the mere neglect to receive rent did not prejudice the right to it.<sup>4</sup> But this rule is now altered, and if there has been no demand of rent for fifty or sixty years, a release will be presumed<sup>5</sup>.

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19.---*Land-tax.*

Land-tax is an incumbrance, and it requires a special exception to relieve the purchaser from its payment.

The presumption *prima facie* is that the land-tax is not redeemed; it is the purchaser's duty to make enquiries on this head, and shape his offer accordingly. If he makes no enquiry he must take this incumbrance as he finds it. A tenant in fee or in tail redeeming the land-tax are supposed to purchase it for the benefit of the estate, and the vendor, seised in fee or in tail, having redeemed the land-tax, cannot I apprehend demand of the purchaser an increase of price on account of the redemption; neither can the purchaser, where the contract does not stipulate that the land-tax is redeemed, claim an abatement in respect of land-tax proving to be due. The case may be different on the sale of a life-estate, as the redemption by a tenant for life does not enure for the benefit of those in remainder, and the price paid by the tenant for life for the redemption is a charge on the land descending to his executors, which the purchaser can scarcely be said to buy without express stipulation.

If the contract or particulars of sale expressly state that the land is redeemed, then the certificate of the Commissioners with the receipt of the cashier or receiver-general of the Bank of England endorsed, should be required, that being the proper and only strict legal evidence of the redemption. On the signature of that receipt, the lands are declared exonerated as from the quarter-day next preceding the payment, provided the certificate of contract be duly registered according to the requisitions of the act<sup>v</sup>. But as no time is limited for this registration, an informality in this respect may be easily rectified by a subsequent registration; in which case, the lands are declared exonerated from the quarter-day next preceding the day whereon the certificate is left for registry. The certifi-

cate therefore with a receipt and memorandum of registration endorsed, are the best evidence of the redemption of the land-tax. If this certificate be lost, reference may be made to the land-tax register office, where if the contract be registered, an official extract or copy of the registry will supply the omission, if any reasonable account can be given of the loss or destruction of the original certificate. The redemption when made by a tenant in fee, is as before noticed presumed to be for the benefit of the state, and as such, it at once sinks into and forms part of the inheritance, and cannot be again separated from it so as to give a third person any lien on the land by possession of the certificate. But if the land-tax be redeemed by a tenant for life, it is considered as part of his personal estate and descendible accordingly<sup>z</sup>.

If the land-tax be not redeemed in due time by the owner of the land, it may be purchased by any other person; in whose hands it is converted into a fee farm rent, with all the remedies of rent reserved upon a lease, in which case it is real estate and descendible to the purchasers *real*—not his *personal*—representative<sup>y</sup>.

The land-tax acts enable persons, having particular or limited interests in lands, as also guardians and trustees<sup>z</sup> of persons under disabilities, to sell or mortgage any competent portion of the lands in fee simple for raising money to redeem the land-tax on the residue. To the validity of these mortgages and conveyances several ceremonies and requisitions are made necessary by the voluminous general act<sup>a</sup>, and titles thereunder are frequently involved in difficulty by some inattention to its numerous sections. But a late act<sup>b</sup> has cured many of these defects by declaring that proof of the

due execution of any deed of sale, enfranchisement, mortgage, or grant, made under the recited acts, or this act by the Commissioners parties thereto, shall be allowed in all courts, and *before all persons*, to be good and sufficient evidence that the several notices and other matters required by the recited acts or this act to be given and done by such vendors, mortgagors, or grantors, previously to such sale &c., were given and done accordingly<sup>c</sup>; and by sections 25 and 26 it is provided that all sales made, and all conveyances executed of lands or hereditaments sold for the purpose of redeeming or purchasing any land-tax, or for raising money for reimbursing the stock or money previously transferred or paid as the consideration for redeeming land-tax or purchasing assignments thereof, or for some other purpose for which lands, &c. were to be sold under the land-tax redemption acts (provided such conveyances appear to have been executed under the authority of the Commissioners authorised to consent to such sales made under such acts), shall be and are thereby confirmed from their dates, and shall be considered as conferring a good title on the purchasers and all persons claiming through them<sup>d</sup>.

It may be useful to add that the land-tax assessments were not filed with the Clerk of the Peace before the year 1744, since which time they are regularly preserved in his office. An official extract under his hand is therefore the proper evidence to support any averment of seisin stated or implied in the abstract.

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20.---*Rates and Taxes.*

Poor rates, highway rates, sewer rates; and in towns, lighting, paving, and police rates; as also in the country



the performance of a given quantity of carriage duty to the roads, the forwarding of soldiers baggage, &c. commonly called 'statute duty;' as also the assessed taxes, are incumbrances charged on the land, and from which no discharge can be obtained, except as to the latter by composition for three years, which is not in fact a discharge.

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21.---*Tithes.*

Tithes are also incumbrances of a paramount nature, from which there is no discharge except by actual purchase. The presumption is that tithes are due, and if the contract contain no stipulation that the lands are sold tithe-free, the purchaser is supposed to have taken into account this liability to tithes in his valuation of the property.—If the lands are sold as *tithe-free*, the necessary evidence in support of that averment has been already adverted to (p. 183.)

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22.---*Protection against Incumbrances.*

The only available protection against dormant and latent incumbrances of which the purchaser has neither actual or constructive notice, is an old outstanding term; but even this protection is reduced to a contingency if the term has not been regularly assigned on every change of ownership. In opposition to the practice of counsel for a long series of years, recent determinations have, against the opinions of many eminent lawyers, supported the presumption of the surrender of terms, even after they have been assigned in trust to attend the inheritance. 'If these decisions are to pre-

vail' say the Real Property Commissioners 'the whole system of protection by the assignment of terms will be deranged ; for there are very few old terms which from some circumstances after the assignment to attend the inheritance, may not be presumed to have been surrendered.' Still it is prudent to take an assignment of the term when it can be conveniently obtained, not so much perhaps as an efficient instrument of defence, as to prevent its falling into the hands of hostile or dormant incumbrancers.

## CHAPTER VII.

### OF EVIDENCE IN MATTERS OF PEDIGREE.

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|----------------------|---------------------|
| 1. <i>Seisin.</i>    | 4. <i>Age.</i>      |
| 2. <i>Intestacy.</i> | 5. <i>Marriage.</i> |
| 3. <i>Descent.</i>   | 6. <i>Death.</i>    |

#### *Sources of Evidence.*

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|--|--------------------------------------|
| 7. <i>Declarations, Entries, &amp;c.</i> | 9. <i>Parish Registers.</i>          |
| 8. <i>Recitals.</i>                      | 10. <i>Herald's College, &amp;c.</i> |
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#### 1.---*Seisin.*

In questions of pedigree the Conveyancer requires the same proof of relationship, deaths, and intestacies as courts of justice—or rather perhaps the courts relax from their usual strictness in this respect, and admit that kind of presumptive evidence which is commonly current with the Conveyancer.—To prove a pedigree the object is 'to shew that the claimant is the next living heir to the person last seised.

If the seisin be not apparent on the abstract, which it usually is, the first step is to shew that the propositus himself was actually seised of the lands in question. This may be done by shewing his actual occupation, which raises the presumption that he was seised in fee unless the contrary appears; or that the property was in

possession of a tenant who paid him rent, or in lease, and then production of the lease or counterpart duly executed and stamped, is sufficient to raise the presumption that a tenancy subsisted, and nothing can be stronger evidence of ownership than the exercise of this power of letting the lands. Whether shewing a mere occupation by A. as reputed tenant to B., without any proof or acknowledgment by A. himself that he was B.'s tenant or that he paid him rent, is enough to prove an actual seisin in B., may be questioned; for it may be, that A. himself was the owner; but after a considerable lapse of time, evidence of such a reputation would doubtless be admitted. The declarations of a deceased occupier, that he held as tenant under a particular person, have been allowed to prove the seisin of that person<sup>a</sup>; and it is admitted on all hands that the possession of the lessee is the possession of him who is entitled to the inheritance<sup>b</sup>.

An extract from the land-tax or poor rate assessments, is the usual evidence of seisin resorted to and allowed by Conveyancers, as it is thereby clearly shewn who are the landlords and who are the tenants. The land-tax acts declare, that the books of assessment shall belong to the Commissioners as a record for their own private inspection, which seems to deny them any credit as evidence for other persons. It has not been distinctly held that a copy of or extract from these books would be rejected in court on a trial of right; but it is clear from uniform practice that as between vendor and purchaser, an extract from the land-tax assessments is good evidence of seisin, if the purchaser requires evidence of seisin to be produced. It has lately been held that an entry in the land-tax collector's book, of a

house being rated in a particular person's name, being an entry made against the collector's interest, is admissible to shew the occupation at that particular period.

The poor rates are by statute 17 Geo. ii. c. 38, s. 14, directed to be entered in books 'to be carefully preserved in some public place whereunto the parishioners may freely resort.' This at once stamps a character of authenticity on these books as between individuals in their private dealings out of court, and whatever credit may be given to a copy or extract from them in court it is clear that in the Conveyancers' chambers, as between buyer and seller, borrower and lender, they are entitled to the belief usually awarded them.

The property-tax assessments were not at the time open to the inspection of the public: indeed such an exposure would have been highly invidious. On the cessation of the tax, the present Lord Chancellor moved in parliament that all the returns of the collectors and every vestige relating to so odious an impost should be destroyed, which was granted; the consequence was that in most, if not all parishes, a large public bonfire was made of the remains of this unpopular assessment. In Lincoln's Inn this act of oblivion was performed before the Chancellor's chambers;—a resurrection of this unequal tax under his auspices, would after this solemn incineration, be a curious commentary on the mutability of human resolves.

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2.---*Intestacy.*

After laying a foundation for the pedigree, by shewing a seisin in the person alleged to have been last seised,

the next step is, to prove his intestacy ; for if he left a will, the devolution of the title would be by purchase as pointed out by that will and not by descent. To raise the presumption of this fact, the first and best evidence is the production of letters of administration taken out to his effects at the time, or an official extract from the ecclesiastical court of the diocese or province where the intestate resided of such letters of administration, if the original letters do not accompany the title-deeds. This alone is sufficient to raise the presumption of intestacy, for it is natural to infer that no will was found at the time, otherwise the legatee or devisee would not have permitted letters of administration to pass. It may indeed occur that a will was made, which relating to real estate only, required no probate; but that is rebutted by the possession being and continuing adverse to any such presumption, and in these days few persons dying seised of land leave no personal chattels,—and leaving chattels, a legal title could not be made to them without letters of administration.

These letters therefore are good proof of the intestacy both to the Conveyancer and the courts until the contrary appears. Instances indeed have occurred where letters of administration have been recalled upon the subsequent discovery of a will ; but that has been where the supposed intestate resided abroad<sup>d</sup>, and can scarcely be held to apply to a case like the one in contemplation, where usually a considerable lapse of time prevents the possibility of such a surprise ; but if the person last seised be the immediate ancestor of the vendor and has spent any considerable portion of his life abroad, then a purchaser would do well to avail himself of every possible means of delay in the completion of his purchase

if there be the least surmise of a forthcoming will. In this he must be guided by circumstances. It is enough to say that the vendor has sufficiently proved the intestacy by shewing letters of administration taken out to the personal estate of his ancestor, and on that evidence he could compel the purchaser specifically to perform his agreement.

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3.---*Descent.*

Having shewn that the propositus died seised, (and any seisin during his lifetime will suffice for this purpose, as it will be presumed that he continued seised to his death, unless there be ground to induce a violent presumption to the contrary) and that he died intestate, we next proceed to the actual descent.

To prove the pedigree of an eldest son, certificates of the marriage of his parents and of his own baptism within a reasonable period of the marriage, are admitted by the Conveyancer as full and ample evidence of the legitimacy, without any proof of the identity of the parties. If the certificates are from the registers of the parish where the parties reside, the presumption is that the persons are the same as the names import; and it is only when there are several of the same name that any evidence of identity is required in practice. In addition to this evidence, to complete the title of the eldest son, certificate of the burial of his mother, if she were entitled to dower, is requisite; the death of his father is considered amply proved by the letters of administration, though in court production of these letters has been held not sufficient evidence of a death

in an adversary suit<sup>e</sup>. But with Conveyancers, both the probate of a will and letters of administration are deemed sufficient proof of the death of the party, where there is nothing to induce a contrary presumption. In one case, mention is made of the probate of a person's will who afterwards turned out to be living<sup>f</sup>. But that is an anomaly to all experience, and is certainly insufficient to destroy the general credit of the probate in this particular.

And here it may be observed once for all, that the certificates, copies, or extracts from parish registers should be under the hand of the clergyman of the parish, and his answer, stating that he has made a search without success, should be preserved as negative evidence that the registers contain no memorial of the facts for which search was instituted.

To prove the pedigree of a second son, certificates of the marriage of his father and mother, of the baptism of himself and eldest brother, and of the burials of his mother and brother, are the best and appropriate evidence; there should also be strong negative evidence that the eldest brother died without issue, which will in many cases appear by the certificate of his burial, where his age and bachelorhood are frequently, though not always noted. If this be not apparent from that source, an affidavit by some member or intimate acquaintance of the family (the former being always preferred for reasons presently mentioned), should be procured to testify his belief that the party was either never married, or if married, never had any issue, or that such issue, if any, died in infancy, &c.; the deponent should also state that he was intimately connected or



acquainted with the family and must have known of such issue if there had been any. If the elder brother left any issue, then certificate of the burial of that issue should be required, and like negative evidence that that issue left no issue surviving, &c. Thus far we have proceeded on the presumption that the eldest son and his issue all departed this life in the lifetime of the father, if not, the descent would be to that eldest son or his issue, who would then become the propositus, and his seisin and intestacy must in that case appear or be proved in the manner before mentioned.

To prove the pedigree of the third son, similar evidence is required. The object is to shew his legitimacy, the baptism of all his preceding brothers and their deaths without issue, as also the decease of his mother if she were entitled to dower. To prove the title of Daughters, the baptisms of all the children must be shewn, and the deaths of all the sons without issue,—also the deaths of any of the claimant's sisters who are dead, as likewise that they died without issue. The force of evidence proving or raising reasonable presumption of these facts, when the more direct evidence by certificates or explicit voluntary affidavits cannot be procured, must of course rest on the intrinsic merits and relevancy of the evidence itself.

The proof of a collateral heirship, as of a brother, uncle, aunt, or cousin, is supported in the same way; but in the course of a long descent, considerable difficulty is frequently experienced in giving any direct proof of the fate of persons who have gone abroad and who have never afterwards been heard of—that these persons died without issue, or that such issue has be-

come extinct. These are difficulties which a court of equity would never compel an unwilling purchaser to accept, unless the lapse of time be such as to raise a violent presumption in favour of the continuing and uninterrupted possession. Neither the non-claim on a fine, nor the statutes of limitations run against persons out of the kingdom, and nothing less I presume than the lapse of a generation, say thirty years at least, would give a colour to the presumption of a party's death without issue; but even after sixty years possession, a title exposed to this difficulty cannot be treated as clearly marketable, though it may be a good holding title and free from any overwhelming risk. The presumptions as to death generally and death without issue are more fully considered in the sequel of this chapter. We now proceed to consider the proof requisite to support different facts, as age, marriage, legitimacy, &c.

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4.---Age.

The certificate of baptism is no evidence of the exact age of a party; it is good evidence of his legitimacy but not of his age, for some parents delay the baptism of their children for many years, though in that case some note usually appears of the christening or the age of the party. But it is not the province of the clergyman to enter the age, and therefore though it be entered it is not evidence on that point in courts, yet the Conveyancer usually receives it as *prima facie* evidence of the age of the party, leaving the other side to shew the contrary if the fact be so.

If it be requisite to prove that a party has attained

his majority, and that does not clearly appear by the register, other evidence must be resorted to, and it has been decided that an entry made by a man-midwife of his having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as paid, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery<sup>b</sup>. Declarations of a deceased parent are also evidence of the time of a child's birth, though they are rejected as to the place of his nativity for fixing a particular parish with a pauper<sup>i</sup>. On a question whether a testator at the time of making his will was of full age, a written memorandum by his deceased father, stating the time of his birth, was admitted<sup>j</sup>, on the ground that the father had peculiar means of knowing the fact in dispute without having any interest to misrepresent it, and the fact itself was not a matter of notoriety, but necessarily lying within the knowledge of a few members of the family.

In a curious case noticed in my collection of opinions and which I have also seen in print, it appeared that a lady of large property was engaged to be married on the very day she came of age, but a doubt arose under the following circumstances whether the day fixed on would not still find her in her minority. It appeared that she was born after the house-clock had struck, and while the parish clock was striking, and before St. Paul's had begun to strike twelve, on the night of the 4th of January, 1805. The question was whether the young lady was born on the 4th or 5th of January. The opinion runs thus :—'This is a case of great importance and some novelty, but I do not think I should be much

assisted in deciding it by reference to the ponderous folios under which my shelves groan. The nature of testimony is to be considered with reference to the subject to which it is applicable. The testimony of the house clock is, I think, applicable only to domestic, mostly culinary purposes. It is the guide of the cook with reference to the dinner hour, but it cannot be received as evidence of the birth of a child. The clock at the next house goes slower or faster, and a child born at the next house the same moment may according to the clock at the next house, be born on a different day. The reception of such evidence would lead to thousands of inconsistencies and inconveniences. The parochial clock is much better evidence and I should think that it ought to be received if there were no better; but it is not to be put in competition with the metropolitan clock; where that is present it is to be received with implicit acquiescence. It speaks in a tone of authority, and it is unquestionably testimony of great weight. I am therefore of opinion, that Miss Emma G. was born on the 4th of January, 1805, and that she will attain her majority the instant St. Paul's clock strikes twelve on the night of the 3rd January, 1826.'

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5.---*Marriage.*

The regular proof of the celebration of a marriage is the parish register of the event, an examined copy of which register is required by the court, but a certified copy under the hand of the clergyman of the parish is received by the Conveyancer. This regular proof however is not always forthcoming. It must often happen, especially in the case of old marriages, where the parties

have been long dead, and the place of marriage is unknown, that such proof cannot be supplied. In that case proof that the parties lived together as man and wife and were received as such in the neighbourhood, is admitted in court as good presumptive proof that they were married; an affidavit to the same effect must be equally convincing to the Conveyancer; and even where the first marriage has been proved to be void for want of due solemnities, the court has presumed a subsequent legal marriage, from the cohabitation of the parties as man and wife, and by the manner in which they were always received by their relations.

In *Wilkinson v. Payne*, where a question arose respecting the marriage of the plaintiff, it clearly appeared that the marriage when it first took place was illegal, the plaintiff being at the time a minor, yet, as the plaintiff and his wife had been always received and treated by the wife's father (the defendant) and by all his family, down to the time of her death, as man and wife, the judge who tried the cause, left it as a question for the jury, whether they would not presume a subsequent legal marriage; the jury presumed such marriage, and found a verdict for the plaintiff; against which the court of King's bench were unanimous in refusing a rule for a new trial. 'Though the first marriage' said Lord Kenyon, 'was defective, a subsequent one might have taken place; the parties cohabited together for a length of time, and were treated by the defendant himself as man and wife; these circumstances afford a ground on which the jury presumed a subsequent marriage<sup>k</sup>.'

It is also observable that either of the married parties,

provided they are not interested in the question, especially if in the case of an estate, their evidence is against their interest, will be competent to prove the marriage, as on the other hand, the evidence of either of them will be admitted to disprove it<sup>1</sup>. The declarations of a deceased person, as to the fact of his marriage, or as to the time of his marriage, are also admissible in evidence on questions of pedigree; and the declarations of deceased members of the family are evidence upon the same point. But the declarations of a deceased person who attended at the marriage as parish-clerk, that the banns had not been duly published, or the declarations of the deceased clergyman that the banns had been forbidden, and were therefore not published—are inadmissible<sup>m</sup>.

It is a well known principle of our law, that a marriage, although voidable for some canonical disability (such as real or legal consanguinity, affinity, &c.) is not void until sentence of nullity has been declared, and is considered valid and operative for all civil purposes, unless such sentence be actually pronounced during the lifetime of the parties: but civil disabilities, such as a prior marriage—want of age—want of reason—the want of consent of parent or guardian, when such consent is necessary—and the non-observance of certain solemnities required by the marriage act, render the contract of marriage not only voidable but absolutely void *ab initio*<sup>n</sup>.

The illegitimacy of any one in the line of ancestors will make a complete chasm or breach in the pedigree; an illegitimate person not having an ancestor from whom any inheritable blood can be derived. The illegitimacy

of a person may arise, either from being born out of lawful wedlock, or if born in wedlock, from not being the true child of the married parties. In an adverse suit it lies with the defendant to point out and prove these defects. The Conveyancer sitting *quasi Judex* can of course know nothing of these facts but as they are represented to him. It therefore behoves the solicitor for the purchaser, who represents the defendant, to use all possible diligence and caution in examining the evidence of a pedigree; for instance, he should not rest satisfied with a bald certificate of a register without proof of a *due* search having been made for others during a reasonable period of time; and he must in some cases make enquiries for his own satisfaction; the expense of which, will of course fall on his client.—The registry of a child's christening is generally considered sufficient to prove his legitimacy—the letters B B. being usually found to indicate a 'base birth,' if the fact be so; and it is observable that the courts evince great reluctance in presuming illegitimacy on slight grounds°.

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6. ---*Proof of Death generally and without issue.*

At law the presumption is, when a party has gone abroad and has not been heard of for seven years, that he is dead, that being the period when the death of a tenant for life is directed by the legislature to be presumed<sup>p</sup>, and when a husband or wife may marry again without incurring the penalties of the statute of bigamy<sup>q</sup>. But these presumptions are never made in matters of title; to act indeed on seven years absence would be to rest on a mere assumption in defiance of the statutes of limitation which save the rights of all persons out of the kingdom.

Courts of law however have gone much further in presumptions of this sort than Conveyancers have felt justified in advising in matters of title, particularly in presuming the failure of issue. Thus proof by an elderly person that a member of her family went to the West Indies many years ago, and according to the repute of the family died there, and that she never heard of his being married, has been considered as *prima facie* evidence that the party died without lawful issue<sup>r</sup>. But the Conveyancer cannot be satisfied that a tenant in tail died without issue on evidence of this kind, and I apprehend a purchaser would not be bound to accept a title from the remainder-man or next heir in tail, on this negative presumption of the determination of the prior estate.

It seems however reasonable, and it has lately been decided, that after a lapse of a century, the death of a party without issue may, in the absence of evidence to the contrary, be fairly presumed, for in assuming that he died leaving issue, you assume two affirmatives viz. that he married and had issue, which is unreasonable<sup>s</sup>, and this presumption may fairly be made in practice.

The best evidence of a person's death is a certificate of his burial, but probate of his will or letters of administration to his effects are treated by Conveyancers as equally good proof of a fact not disputed by the relations. If the death happened ten or twenty years ago, I apprehend those documents would be admitted for this purpose in court, but in an adversary proceeding where the personal representative sues for some right or interest due to the intestate or testator, it seems that production of letters of administration to his effects is not



*prima facie* evidence of the death of the individual. Thus where it was alleged that the person entitled to the interest of a policy of insurance was dead at the time the policy was effected; Lord Kenyon said he should expect further proof of the person's death than the mere production of the letters of administration: such letters had often been fraudulently obtained when the party was living and had been afterwards repealed. Whether the insured was living or dead at the date of the policy was a fact capable of other proof, which the defendant should have been prepared with<sup>t</sup>. So in chancery, the mere production of the probate is not, it seems sufficient to obtain payment to the personal representative. Proof of the death is now required; as also that the testator was a party in the cause<sup>u</sup>. In a late case it was contended, that the practice of the court was, to allow letters of administration or the probate to be read in evidence of the death, unless those documents were impeached on the other side. But the Master of the rolls decided that the letters of administration were not *prima facie* evidence of the alleged intestate's death. Lord Hardwicke on the contrary, after a considerable lapse of time, admitted the probate to be read in evidence of the testator's death, for at the time of proving the will, it must, he thought, have been proved that the party was dead, and considering the place of his death, it was, under the circumstances, difficult to obtain more positive proof<sup>v</sup>.

In the Conveyancers chambers, probate and administration are usually treated as ample evidence of the death of the parties, if those documents have been acted on; and I should think the purchaser could not in addition require certificate of the burial of the testator

or intestate; but that point is a question worth debating, as a certificate in a recent case can easily be procured, and after a confirmation by a period of concurrent possession, such a requisition is seldom, if ever made.

The books kept at the 'Sick and Hurt office,' containing copies of the returns made by the Officers, of persons dying on board the king's ships, are evidence of the deaths of seamen<sup>w</sup>. Hence the letter D. marked against the name of an individual in the navy office is usually admitted as good evidence of the decease of the party against whose name it is set. With respect to his arrear of pay, if any, letters of administration must of course be taken out, which letters are filed at the navy office, and a cheque is granted out. That office therefore is the proper place to search for the death of a seaman stated or supposed to have died in service. Returns are also made to the India House of the deaths of soldiers and other officers in the service of the company, and search may be made there, if the death of an individual known to have to have been in that service be stated or suspected. A deed dated 1786 contained the following recital:—'And whereas the said A. B. about sixteen years ago entered the East India service as a soldier, and for twelve years now last past he hath not been heard of, though repeated enquires have been made for him at the India House, and it is believed that the said A. B. is now dead, in which case the said C. D. as his next brother would be and is his heir at law.' In 1826, this was excepted to as incomplete evidence of his death without issue. But being a period of forty years from the date of the recital and fifty-two years from the last account of the individual, a court of equity

would I apprehend be extremely slow in pronouncing the title defective and unmarketable on this account, especially if other evidence were adduced that the individual had never since been heard of, that a claim had never been made, and that the reputation in his family was, that he had long since died without any children, &c.

The deaths of soldiers and privates in regular service may be ascertained by reference to the books of the colonel or major of the regiment, but I am not aware of any general office where returns are made and preserved of the deaths and names of the particular individuals who die in service.—It may not be amiss to add in connection with the subject of this paragraph that evidence ‘of absence and not being heard of’ for thirty years, has been held sufficient to raise a presumption of a mortgagee’s death on a bill by a mortgagor to redeem <sup>x</sup>.

If an estate be limited to A. for life, with remainder to trustees during his life, in trust to preserve, &c. with remainder to A’s first and other sons in tail in strict settlement, with remainder to B. for life and his first and other sons, &c. in the same way, and it is stated in a conveyance by B. that A. died without issue, whereby the estate devolved on B., and that B. and his son, then of age, intend suffering a recovery, &c. the question is, what proof of the fact of A.’s death without issue, the Conveyancer has a right to require in addition to the recital?

The age of the recital with consistent possession and custody of the deeds, will, in the absence of any doubt about the fact, tend to relax the anxiety naturally ex-

cited by a statement of the failure of this important link in the title, and if it be between fifty and sixty years old, a simple affidavit that no issue has ever been heard of, may as a general proposition be considered sufficient. But even if the recital be sixty years old, the Conveyancer, I presume, has a right to require A.'s will, if any, and production and delivery of a full and examined copy of such will, if found, in order to satisfy the purchaser that no provision was made for a wife or issue, and if no will be found, then evidence of the unsuccessful search should be preserved, and an office copy of or extract from the letters of administration granted to his effects be required, to shew the kindred of his administrator, &c., as also certificate of his burial, which usually denotes by the letter B. whether the party died a bachelor; *that*, with the recital and other circumstances, will afford strong corroborative evidence of the actual fact of his death without issue. But still I apprehend, a purchaser has a right to require an affidavit from a relation unconnected in interest, or against whose interest it is to make such declaration, that the deponent knew the party, and never heard of his having been married or of his having any family, and always understood that he never had been married, and never had any family, &c. An affidavit to the same effect by an intimate acquaintance, is usually considered by Conveyancers as equivalent to an affidavit by a relation, but a late case presently mentioned, has involved that point in some doubt. Certificates of the marriage of B. and of the baptism of his eldest son, are also requisite in proof of the pedigree of the tenant in tail in the foregoing case.

A woman entitled to dower need not necessarily sue

for it immediately after her husband's decease ; she may, where she is not expressly put to an election, enjoy a benefit under her husband's will, and on the cessation of that benefit, she may claim her dower ; so that a number of years may elapse between her husband's death and the claim of dower actually made. A case of this kind is now in discussion on a question as to freebench in the manor of Cheltenham. It is alleged that freebench in this manor, like dower at common law, does not require the husband to die seised,—any seisin during the coverture, it is alleged, is sufficient to give the widow her freebench ; and strong proof has been adduced in support of that custom. After a lapse of twenty years the lady of a deceased proprietor, who had sold and disposed of all his copyhold property in the manor long before his decease, and which has since been granted out in separate plots on building lease, now claims a life interest in an extensive estate greatly improved by the erections completed and in progress, and the claim is enforced with such convincing arguments, that in many cases parties have submitted to compromise rather than risk a trial of the question. Whenever therefore a title to dower has attached within a period of sixty years, the purchaser has an undoubted right to require some evidence of its release, cessation, or abandonment, though after a lapse of forty years this right is seldom pertinaciously insisted on.

The most direct proof of the non-existence of a right to dower, is a certificate of the burial of the dowress herself, or of the tenant, wherein he is described as a bachelor ; but after a lapse of thirty years much slighter evidence will suffice, and indeed the presumption is rather against than in favour of the possibility of

a claim after so long an acquiescence. Still some evidence rebutting the probability of a claim may be required, if by any reasonable possibility the dowress may be supposed to be living at the time the title is investigating. The possession of the deeds is in this case of no avail, as the dowress may recover without them<sup>y</sup>; though a tenant by the curtesy it seems cannot<sup>z</sup>. But an old outstanding term created prior to the marriage will be a good bar<sup>a</sup>, as would a fine and non-claim levied after the husband's death.

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*Sources of Evidence in matters of Pedigree.*

7.---*Declarations, Entries, Inscripttons, &c..*

In making out a pedigree of any extent, the first and best evidence cannot always be produced; it is therefore essential to enquire what secondary evidence is admissible and what presumptions may be made and relied on. And first, it is observable that the traditionary declarations of deceased members of the family are in general admissible as evidence, after the deaths of those persons, as to the degrees of relationship of the different branches of the family, their intermarriages, the number of their children, and the times of their respective births and deaths<sup>b</sup>.

But to warrant the admission of declarations relating to pedigree, it should be proved that the declarant is dead, otherwise his declarations are not the best evidence<sup>c</sup>, and it should be made appear that he was likely to know the facts deposed to. Lord Eldon has said<sup>d</sup>, that 'declarations in a family, descriptions in wills, in-

scriptions on monuments, in bibles, and registry books, are all admitted, on the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when the mind stands in an even position without any temptation to exceed or fall short of the actual facts.' As a general rule, observed Best C. J. in a late case, hearsay is not admissible evidence, but to this general rule pedigree causes form an exception, from the very nature of the case. Facts must be spoken of which took place many years before trial, and of these, traditional report is often the only evidence that can be obtained ; but evidence of this kind must be subject to limitation, otherwise it would be a source of great uncertainty, and the limitation hitherto pursued, namely, the confining such evidence to the declarations of relations of the family affords a rule at once certain and intelligible. If the admissibility of such evidence were not restrained we should, on every occasion, before the testimony could be admitted, have to enter upon a long enquiry as to the degree of intimacy or confidence that subsisted between the party of the deceased declarant. In accordance with these principles it was expressly held that declarations of servants and intimate acquaintances are not admissible evidence in questions of pedigree<sup>e</sup> ; and a similar opinion was expressed by Abbot C. J. in a later case<sup>f</sup>.

In support of a title, voluntary affidavits by living witnesses who are not relations of the family are frequently admitted as the best and only evidence that can be procured. Relations are not always at hand, nor can they always speak to the situation and circumstances of the less opulent members of their family.

The case is sometimes reduced to the alternative of receiving the declarations of strangers or rejecting the title, which latter course a willing purchaser, where a fair case is made by voluntary affidavits, is unwilling to pursue. When the deponent speaks to what he heard a member of the family say, *that*, we have seen<sup>g</sup>, would be inadmissible in court if he were not himself a relation to the declarant, but such depositions by servants and intimate connections, stating and swearing to their means of knowledge and acquaintance, have for a long series of years and by a uniform course of practice been received in chambers where other and better evidence cannot be obtained; in support of which negative assertion, it will require to be shewn that diligent search has been made in parish and other registers for information in vain; and this evidence of unsuccessful search should be carefully preserved for future use. The entertaining account of Mr. C. Bell, in searching for evidence to support the Huntingdon Peerage, published a few years ago, is a living commentary on this part of the subject.

On similar principles it is, that proof of the cohabitation of parties who lived together as man and wife, their treating and educating children as their legitimate offspring according to their rank and station in life, and their acknowledging them to be such in the face of the world;—or on the other hand, the representation and treatment of a child as illegitimate, are all of them solemn and deliberate admissions relating to the facts necessarily within the knowledge of the parties making them, accompanying and corresponding with acts and conduct<sup>h</sup>. The presumption *prima facie* is, that a child born in wedlock is legitimate, and that presumption



must be legally resisted by evidence of such facts or circumstances as are sufficient to prove to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife, at any time, when, by such intercourse, the husband could by the laws of nature be the father of such child. Formerly, access was presumed if the parties were within the narrow seas, though there was no doubt of the contrary. Now, proof of the husband's continuance in the narrow seas for a twelvemonth together would, in all probability, be held good evidence of non-access. Indeed it is sufficient if the circumstances of the case show a natural impossibility that the husband could be the father; as where he had access only a fortnight before the birth. This subject is fully discussed in the Banbury peerage case, to which voluminous disquisition, it is merely necessary here to refer<sup>i</sup>. Proof of the reception into society of a woman as the wife of a particular person, is sufficient evidence after the death of the woman to support the legitimacy of her son<sup>j</sup>; for it being proved that she was received as a respectable married woman, improper conduct could not be presumed. But a parent may bastardize its own issue, though a person coming to do that is always looked upon as a very suspicious witness<sup>k</sup>. That the marriage is according to the act is a necessary presumption till the contrary is shewn.

An entry by a father in a bible, or in any other book, stating that A. B. was his eldest son born in lawful wedlock by M. N. his wife at the time specified, is evidence to prove the legitimacy of A. B.<sup>l</sup> The circumstance of an entry being in a family bible, to which all the family have access, gives it a credibility which it

would not have, if made in a book remaining in the exclusive possession of the father. Entries in family bibles have therefore become common evidence of pedigree in this country; and in America, where there is no registry of births, or baptisms, scarcely any other is known<sup>m</sup>. So a bible produced by a woman aged sixty-seven, who said it was given to her when seven years old by her father, who told her that it belonged to her grandfather, is evidence to be left to the jury to say, whether an entry in it, by which it appears, that her grandfather was the son of a certain person, is true<sup>n</sup>.

Upon the same principle, a pedigree hung up in a family mansion, inscriptions on rings used by members of the family, inscriptions upon tombstones<sup>o</sup>, and other matters of the like nature, are admissible to prove a pedigree, for they are all in their nature equivalent to declarations made by the family upon the subject<sup>p</sup>. A bill in chancery by a father, in which he states his pedigree, is also admissible for the same purpose<sup>q</sup>. So it has been held that a paper found with other papers, relating to private concerns of the party last seised of an estate, in a drawer in his house, purporting to be the will of Richard, the grandfather of the person last seised, is evidence to show that the grandfather acknowledged a brother of the name of Thomas to be older than a brother of the name of William<sup>r</sup>, although the will was found in a cancelled state, and although there was no evidence that it had ever been acted upon, or that it had ever been proved.

The declarations of a deceased member of the family, on a question of pedigree, are not to be admitted, unless as before mentioned, they have been made under

circumstances, when the relation may be supposed without an interest and without a bias. If they were made on a subject in dispute, after the commencement in a suit, or after a controversy preparatory to one, they ought not to be received in evidence, on account of the probability that they were partially drawn from the deceased, or perhaps intended by him to serve one of the contending parties. But there has been some difference of opinion on this subject.

With regard to the competency and credibility of the witness whose evidence is proposed in proof of a pedigree, it is essential to enquire whether he is in any way connected in interest, so as to render it possible that his testimony may be biased by a desire to support the title; and this point I apprehend the Conveyancer has a right to look to as well as the court. A voluntary affidavit by the solicitor of the vendor, therefore, is exceptionable, unless a general release of all demands accompany it; but objections of this kind must of course be regulated by the circumstances of each particular case.

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8.---*Recitals.*

If a person's death be recited in a deed 40 years old, the Conveyancer usually relies on that recital and requires no further proof of the fact; but this is a matter of discretion, and he may it is apprehended require other and more direct evidence of the deaths of the different owners where by the probable duration of life they may still be supposed to be living. A recital is rather an interested witness, for it is seldom if ever made with the knowledge or concurrence of parties having an adverse

title; it is a tale told by the party whose interest it is to support the deed, and therefore is not of that unprejudiced character which other evidence preserved without reference to any particular transaction is impressed with. Nevertheless if there be no apparent motive for misrepresentation, and the recital is borne out by forty years undisturbed possession, the Conveyancer usually gives credence to the statement, and if the purchaser has to pay the expense of all requisite evidence, he commonly relies entirely upon it; but if the vendor has not shifted the expense from himself, certificates of the burial of persons who according to all human probability must long since have paid the debt of nature, are sometimes required; but the title is seldom rejected for want of such evidence, if it cannot be procured; and if it were positively refused, it may be fairly doubted whether the purchaser could declare off his bargain, unless perhaps the validity of a recovery depended on proof of the determination of a preceding estate for life before the recovery suffered; in that case a bare recital of the determination of the estate is never relied on; some clear unprejudiced proof *aliunde* is requisite to support that fact; for though a good tenant to the præcipe will in certain cases be presumed after twenty years, yet if an obvious impediment to the operation of the recovery be not clearly removed, such presumption cannot be made.

Similar observations occur with respect to marriage. If uses are made to shift on the solemnization of a marriage between A. and B., and in a subsequent deed thirty or forty years old (certainly the latter), the marriage is recited to have taken place, and some dealing with the property is made by a person professing to be

the issue of that marriage, which is acquiesced in for a number of years, that recital, with the concurring possession is usually treated by the Conveyancer as good presumptive evidence of that fact; and although more formal evidence is frequently required, yet I believe it is seldom insisted on.

But with respect to the birth of issue, certificate of the baptism of a person stated to have come of age forty years ago is not unreasonably called for; and if that certificate agree with the deeds in point of time and parentage, all things conspire to confirm the recital, and a purchaser may under these concurring circumstances safely rely on that single certificate without further proof of the marriage, legitimacy, or identity of the parties. But with respect to long and complicated pedigrees, the case is different, *there* each link must be carefully examined yet it is unnatural to expect that a title depending on a chain of events shall be found without a flaw.

The value of statements and recitals respecting pedigrees in old deeds, depends entirely on the circumstance, whether possession has accompanied the deed containing the recital. If the deed itself be not sanctioned by the tacit acquiescence of parties, privies, and strangers, the recitals in it cannot be entitled to much weight. And it is further observable, that if a deed thirty years old, recite the then vendor's pedigree, and it appears by the prior title that possession did not accompany the pedigree until the period of that conveyance, as where it was outstanding in a mortgagee who continued in the occupation many years after he had been repaid by the rents and profits, the recital of the

pedigree in this deed, thirty years old, though accompanied with possession ever since, is not sufficient to deprive a purchaser of his right to extrinsic evidence in support of the pedigree ; for he has notice that the sanction of possession did not accompany the recital at the time, and thirty years subsequent possession is not enough to make that true which was a bare assumption originally. If the parties had been in possession all along, then the recital of their pedigree in a deed thirty years old accompanied by possession ever since, would be strong proof of the truth of that recital, and the *onus*, it is apprehended, would be thrown on the purchaser to disprove such ample and convincing testimony.

The following recently reported case, affords a pointed illustration of these remarks :—John Cormick by his will dated 1732, devised his estate after the decease of his wife and subject to the payment of a certain sum, which he empowered his trustees to raise, to his second son John for life ; remainder to the first and other sons of John in tail male ; remainder to his daughters in tail general ; with remainder to his own right heirs. He died not long afterwards, and his widow died in 1747. Default having been made in payment of the legacy charged upon the lands, the trustee raised the same by mortgaging the property for a term of 1000 years, and the mortgagee entered into possession and continued in receipt of the rents and profits till 1793, when the property was claimed by A. and B. as heirs of the bodies of two daughters of John Cormick ; and in the same year, they by deeds of lease and release, reciting the devolution of title to them under the will in consequence of the death of the sons of John Cormick without issue,

and by a fine and a common recovery, conveyed the premises to Brickwood in fee. The mortgage term was then outstanding ; and Brickwood afterwards obtained an assignment of it from the personal representatives of the mortgagee. From 1793 the possession remained unchallenged and undisturbed in Brickwood and those claiming under him. But there was no evidence that any of the persons who would have been entitled under the will, dealt with or exercised any right over the property between 1747 and 1793.

A purchaser from Brickwood now required proof of the pedigree stated in the deed of 1793, to which the vendor answered, that under the circumstances of the case, he was not bound to establish, by extrinsic testimony, the truth of the recitals in the deeds of 1793, which set forth the pedigree of A. and B. and purported to trace the devolution of title to them under the original will. The question came on in the shape of an exception to the report of the Master who had certified against the title. For the vendor it was contended that minute recitals had been founded in deeds which were now more than thirty years old, showing that in 1793, the title under the will of John Cormick had vested in A. and B. and that the possession had ever since gone along with the asserted title. Under such circumstances, it was urged that the court must presume that A. and B. filled the characters which were ascribed to them unless evidence were adduced to raise a reasonable doubt to the contrary. But Lord Gifford, M. R. was of opinion that these recitals, whatever effect they might have against the parties to the deeds, could not as against third persons, be any evidence of the pedigree. If

evidence had been given that possession had followed and accompanied the pedigree ; if, between 1747 and 1793, a possession had been shown passing from parent to child under the entail created in 1732,—*that* enjoyment would have been a strong circumstance to prove that the persons named in the pedigree did, in fact fill the characters, which it was in 1793 alleged they did fill. In 1766, affidavits were made, with a view to enforce the claim of the daughters through whom the plaintiff derived title; and 1785 fresh affidavits with respect to the state of the family were made for the same purpose. On neither occasion, however, was the claim enforced, and there was not the slightest proof of any possession from 1747 to 1793 in those through whom the title was traced and it did not even appear how the possession was ultimately obtained.—With nothing but the recitals of the deeds executed in 1793, the conveyance to Brickwood, and the subsequent enjoyment under that conveyance, with no proof of the pedigree on which the title depended, or of possession from 1747 to 1793 according to that pedigree, Lord Gifford could not say that the Master had drawn a wrong conclusion, and that this was a title which a purchaser could be compelled to accept. The exception was accordingly overruled\*.

It is finally observable that as a recital alone without possession is entitled to little consideration, so possession alone has been said to be equivocal ; but when parties state in instruments the character and title under which they have, and have had possession, their possession is to be attributed to the title and character which they state. In examining into things that happened nearly half a century ago : you can have no better



criterion to look at and abide by, than the documents which contain the acts of the parties, and those acts being attributed to particular characters by the parties themselves, it lies with those who assert the contrary to prove it <sup>t</sup>.

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9.---*Parish Registers.*

Parish Registers are evidence of births, marriages, and burials. Registers are directed to be kept as public books, and are accompanied with all the means of authenticity. 'They are in the nature of records,' said Lord Mansfield 'and not be produced, or proved by subscribing witnesses'. To prove a marriage for instance, an examined copy of an entry is sufficient; this is proof of a marriage at a certain time between two parties describing themselves by the names and places of abode there mentioned <sup>v</sup>.

With the Conveyancer a certificate under the hand of the clergyman is considered the best and most appropriate mode of authenticating the register, as that certificate is usually accompanied by a letter announcing that a careful search has been made and the result is enclosed. That letter is in itself no value in court, but it is convincing to the purchaser under the hand of an official registrar of the events, that no other births, &c. have taken place, and as such it should be preserved to accompany the deeds. It is sometimes required in court to prove the identity of the parties married or burried, but this is seldom required by the Conveyancer, unless in such palpable instances as John Smith and other common and familiar names; the presumption is

that the register of the burial or baptism of a person corresponding with general repute, requires no further verification, the *onus* by the common practice being thrown on the purchaser to rebut the necessary and fair inference as to identity if he has any reason to doubt the relevancy of the register to the fact in question. It belongs to the vendor to make the searches, as the evidence is part of his title and is produced at his expense, but he is responsible for any negligent or inefficient search which he or his solicitor may perform on the purchaser's behalf<sup>w</sup>.

The keeping of registers for entries of births and christenings commenced in the thirteenth year of the reign of Henry the Eighth, and was afterwards enforced by injunctions from Edward the Sixth and from Elizabeth<sup>x</sup>. Registers also for recording burials and weddings were directed to be regularly kept, by one of the canon's of the church<sup>y</sup>. And by the ecclesiastical law, as far back as the reign of King Edward the Sixth, and again in the reign of King Charles the Second, 'pastors and curates are directed to admonish the people, that they defer not the baptism of infants any longer than the Sunday next after the child be born, unless upon great and reasonable cause declared to the curate, and by him approved<sup>z</sup>.' But the fullest directions are given by the marriage act<sup>a</sup>; which after requiring registers to be kept as public books in every parish for the purpose of registering marriages, enacts, that 'immediately after the celebration of every marriage, an entry thereof shall be made in such register, in which entry or register it shall be expressed, that the marriage was celebrated by banns or license; and if both, or either of the parties married

by license be under age, with consent of parents or guardians, as the case shall be ; and shall be signed by the minister with his proper addition, and also by the parties married, and attested by two credible witnesses.' By the canons of 1603, copies of parish registers in every diocese ought to be regularly transmitted once in every year to the diocesan or his chancellor<sup>b</sup>,—a regulation extremely important, for the purpose of guarding the evidences of title and pedigree, but which has been so generally neglected as to make it necessary for the legislature to interpose and pass an act for their better preservation.

It is by this statute enacted<sup>c</sup>, that copies of the register books, verified by the officiating minister of the parish, shall be transmitted annually by the churchwardens, after they or one of them shall have signed the same, to the registers of the diocese within which the church is situate ; so that the loss or destruction of the registers by the carelessness, accident, or design of the priest or his clerk is in future provided for. The schedules attached to this act, containing the forms of entering baptisms, marriages, and burials, are referred to in the note<sup>d</sup>.

An entry of marriage in the parish register, made in the form prescribed by this act of parliament, is evidence, that the persons therein named were married on the day specified, by banns or license, as the case may be. Such an entry is not essential to the validity of a marriage ; so that if it has not been expressed in the regular form, the only consequence will be, that it cannot be admitted as evidence of the marriage, which must therefore be established by some other medium of

proof. In order to prove the parties described in the register, to be the persons actually married it cannot be necessary on all occasions to call the subscribing witnesses to the marriage, any evidence which satisfies the jury concerning their identity, will be sufficient; as, proof of similarity of their handwriting, or that the bell-ringers were paid by them for ringing after the marriage, or proof of other circumstances to ascertain the persons<sup>e</sup>.

In *Walker v. Wingfield*<sup>f</sup>, a question was raised whether a register not kept according to the canon, which requires weekly returns, could be admitted in evidence. But it has since been distinctly decided that if the clergyman dies before he makes the returns, the register is inadmissible as legal evidence. In this case it was held that an entry in the register book by the minister of the parish, of the baptism of a child, which had taken place before he became minister, or had any connection with the parish, and of which he received information from the parish clerk, is not admissible in evidence; neither is the private memorandum of the fact made by the clerk, who was present at the baptism<sup>g</sup>.

But the misnomer of the husband's name in the register of his marriage, as James Farron for James Fallon, when he signed by his true name, and all other requisites of the marriage act are complied with, will not invalidate the marriage, there being proof of identity, courtship, cohabitation, and issue pleaded<sup>h</sup>. But a similar blunder in the register of a baptism may be attended with serious consequences, which clear proof of identity would scarcely rectify.—The law presumes the birth to be legitimate till the contrary is shewn. The

baptism of bastards is usually designated by the letters B. B. meaning base-born, but some evidence it is presumed would be required to shew that such is the usual import of these significant letters, though the bastardy will be apparent by the non-entry of the father's name. It is observable that the late act <sup>i</sup>, does not require the state of the deceased to be added, whether married or single, and therefore the letter B. frequently found in the registers of burials, meaning *Bachelor*, is no direct evidence of bachelorhood, though it certainly affords strong presumption of the fact.

A book of fleet marriages cannot be read as a register, not having been compiled under public authority, and is not therefore legal evidence <sup>j</sup>. A copy of a register of baptism kept in the island of Guernsey, which is governed by its own laws, so that no act of parliament is binding there unless it receive the sanction of the constituted authorities, is not admissible in our courts of law <sup>k</sup>; nor is the copy of a register of a foreign chapel admitted here as proof of a marriage abroad <sup>l</sup>

The registers of a dissenting chapel are not allowed to be pleaded in evidence, on the ground that they are mere private memoranda and not copies of public documents in official custody <sup>m</sup>. The entry of the birth of a dissenter's child in a register kept at Dr. Williams' library in Red Cross Street, has been distinctly held to be inadmissible as legal evidence. The books themselves, however, may be produced at the hearing of the cause, and be made evidence to a certain extent: by which means the party will have the benefit of them, though in a different manner from that in which they were attempted to be produced <sup>n</sup>. And the

Conveyancer I presume would admit a certified copy of a dissenter's register as proof of legitimacy where no other evidence of the fact could be obtained.

Quakers in order to be doubly secure make a note of the baptism or burial at the time, and at the next monthly meeting deliver it to the registrar, who, putting it in a condensed form with others, sends it to a quarterly meeting, where it again undergoes an entry in a different shape, a copy of that entry is delivered out to the parties, which is clearly objectionable as legal evidence, being at best but a copy of a copy°. The general depository of quakers' registers is at Devonshire House, and of other dissenting denominations, at Dr. Williams' library, except the Wesleyan methodists and moravians, who have registers of their own, as also have many of the independent and baptist congregations. Quakers, methodists, and moravians have a general code of laws regulating the whole body, but the several congregations of independent dissenters have no connection with each other in church government. The consequence is, that though Dr. Williams' library is made a general repository for registers of burial, marriage, and baptism, it is not universally so, and the private registers of the several congregations must be inspected to find out any particular register not there recorded.

Copies of these registers are certainly not evidence in court, for copies are never received when the original can be procured, except in cases of public records declared to be such by act of parliament or acknowledged by the court, which dissenters' registers are not; therefore the originals themselves must be produced. In the absence of other and better evidence, these originals

will not be treated with total disregard; they are however not received in court as primary but only as secondary evidence of the facts recorded; and in order to admit them, a foundation must be laid, by shewing that unsuccessful searches have been instituted for a parish register of the event, and that the person who is the subject of the register, was a dissenter, and that his birth or death is entered according to the custom of the congregation to which he belonged. These preliminary facts being established, the entry in the register will be let in as subsidiary evidence affording presumptive proof of the particular fact sought to be established.

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10.---*Herald's College, &c.*

By the laws of the college of arms all pedigrees must be signed by the proper hands of the parties requesting entries to be made in their books, and entries produced, not so signed, are not, for heraldic purposes, entitled to any credit; but on trials at common law, the question of admitting or rejecting heralds' books as evidence is always treated as a point of law, and is determined on reasons of law and authority without any examination of the facts<sup>p</sup>. But a charter of pedigree is not evidence, without showing the books and records whence it is deduced<sup>q</sup>; and though the heralds' books are sometimes allowed to prove a pedigree, yet this is because there is no better evidence, and because it is the proper business of the heralds to keep pedigrees, and therefore some credit is due to their books, but they are not entitled to much attention as they are very negligently kept<sup>r</sup>.

Pedigrees of noblemen are pretty well attested by the fact of their succeeding to and using the titles and dignity ; but this is no evidence in a court of law on a trial of right ; nor can Debrett's peerage or any other voluntary collection of facts relating to the pedigrees of peers be received in evidence on a question of legitimacy. When a peer is a trustee, a willing purchaser will in general rest satisfied with the statement mentioned in those unsanctioned records, if he finds the title and dignity in accordance therewith ; but an unwilling or captious purchaser may, I apprehend, legally insist on more formal and direct proof of the descent of the legal estate from the trustee to his legitimate heir.

Many other sources of proof are adverted to by writers on legal evidence, with which however the Conveyancer has little concern. These we may dismiss with this general observation, that what is deemed good evidence in court, must be equally so in chambers ; and therefore in cases requiring reference to matters out of the ordinary course, resort must be had to works of a more extensive character to ascertain the value of the evidence tendered.



## CHAPTER VIII.

## OF SECONDARY EVIDENCE AND NECESSARY PRESUMPTIONS.

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|---------------------------------|---------------------------------|
| 1. <i>Secondary Evidence.</i>   | 3. <i>Voluntary Affidavits.</i> |
| 2. <i>Recitals.</i>             | 4. <i>Presumptions.</i>         |
| 5. <i>Proposed Alterations.</i> |                                 |
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1.---*Secondary Evidence.*

Proof of the *loss* or *destruction* of the original document is a necessary preliminary to the admission of secondary evidence, and of the two, proof of the *destruction* more readily lets in the secondary evidence of a copy, than proof of the *loss*, which must ever be incomplete and exceptionable. 'It is difficult,' says Mr. J. Best, 'to lay down any general rule as to the degree of diligence necessary to be used in searching for an original document, to entitle the party to give secondary evidence of its contents. That must depend, in a great measure, upon the circumstances of each particular case. If a paper be of considerable value, or if there be reason to suspect that the party not producing it, has a strong interest which would induce him to withhold it, a very strict examination would properly be required ; but if a paper be useless, and the party could not have any interest in keeping it back, a much less strict search would be necessary to let in parol evidence of its contents \*.'

The point to guard against in this respect is a pledge or deposit of the original document. If the deeds can be satisfactorily traced into the hands of a particular individual, and he disclaims all lien on the land, then if he can give any reasonable account of their loss or destruction, the abstract may be reluctantly compared with attested or other copies; but a title thus proved must necessarily be exposed to suspicion, and cannot be pronounced as either certainly safe or saleable. As a cardinal point, the abstract should, if possible, be examined with the original deeds; and though a case may be made, in which, on a trial of right, the court would admit the secondary evidence of copies and adjudicate the right on that evidence, still I apprehend a purchaser, not being apprised of the fact before he entered into the contract, is not bound to complete his purchase, if the deeds from any cause whatever be not forthcoming, unless this want of primary evidence be rendered palatable by an abatement. The circumstances must of course regulate the advice which accepts a title so circumstanced even with an abatement; but concurrent possession will afford strong corroborative evidence of the truth of the copy.

With respect to copies generally, it is observable that a copy of a copy is not evidence, for the courts require the best evidence the nature of the thing admits, and the further off any thing lies from the first original truth, the weaker must be the evidence; besides there must be a chasm in the proof; for it cannot appear that the first was a true copy. Copies are of various sorts,—there is first, an Exemplified copy under the seal of the court. Second, an Official copy signed by the officer to whose care the original is entrusted. Third, an Attested

copy ; and fourth, a Plain copy sworn to be true by the *viva voce* testimony of a witness who has examined it with the original. The first and fourth only are admissible in court, unless as to the second and third they are borne out by the collateral sanction of the examiner's oath. The Conveyancer can of course have little concern with this fourth kind of copy ; for he has no power to administer an oath, but in lieu of that, he sometimes requires an affidavit to be made, by the party making a particular search, that the annexed copy is a faithful transcript of what it purports to be.

Exemplifications are of higher authority than sworn copies ; for the court of justice which puts its seal to the copy, is supposed more capable of examining, and more exact and critical in the examination, than another person is or can be. With respect to Office copies a difference is taken between a copy authenticated by a person entrusted for the purpose, which is admitted in evidence without further proof ; and a copy given out by an officer who is not specifically authorised to make it, this copy is not evidence without proof of its actual examination<sup>b</sup>. The distinction between office and sworn copies has been adverted to (*ante* p. 101.) The evidence of copies in court is elaborately treated of by several distinguished writers and need not be repeated here.

We may sum up this part of our subject in the words of a cotemporary writer. 'When a deed or will has been lost, and diligent search is proved to have been made in the proper places and of the proper persons, and the subsequent enjoyment has been consistent with its alleged contents, a counterpart, an ancient copy, and *a fortiori*,

an old attested copy, or a copy enrolled for safe custody, an ancient copy of an admittance to a copyhold, whether or not signed by the steward, the rough draft of a release, especially if the original bargain and sale for a year be forthcoming, the draft of a copyholder's admittance, the steward's book, containing minutes of the surrender and admittance, an old abstract, particularly when it appears to have been perused by professional persons and that objections to the title have been made and answered,—will all be admitted as evidence of its contents; nor will the force of such evidence be destroyed by the fact that an unexecuted engrossment of the deed in question has been discovered; as the engrossment might have been lost or mislaid by accident; and in default of such testimony, parol evidence will sometimes be admissible, particularly where there has been a wilful destruction of the instrument by the opposite party<sup>c</sup>.

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2.---*Recitals.*

With respect to the secondary evidence of recitals, it is observable that the recital of one deed in another, is by some authorities<sup>d</sup> considered evidence at law of the existence and contents of the recited deed, as against the party to the deed wherein the former one is recited and those claiming under him, though no proof be tendered of the loss or destruction of the recited deed, but now such recital is considered as secondary evidence, and admissible only when the first deed is shown to be lost or some other reasons are given for not producing the regular and best evidence of it; for even the admission of a deed on oath will not obviate the

necessity of giving regular evidence of its execution, much less therefore can the recital of the deed in a matter entirely devoid of that sanction be admitted as the first and best evidence when better evidence is forthcoming, and perhaps in court. The recital is an estoppel to the grantor, but that it is always so to the grantee, is a point which remains to be decided. As against a stranger it is clear that the recited deed must be proved in the regular way.

The value which the Conveyancer attaches to a recital has already been in part noticed (*ante* p.299.) He treats it as an interested witness and of that character which declarations and affidavits after a suit commenced are said to bear in court. Recitals in modern deeds he requires to be verified by extrinsic evidence; and recitals of documents on record, such as wills and administrations which are not abstracted in chief, he requires to be authenticated by the documents or records themselves, though the recitals may be contained in deeds fifty or sixty years old. But single isolated facts stated or recited in antient deeds, say forty or fifty years old, are in general considered as sufficiently proved by the recital, if possession has been consistent with the right disclosed by the abstract, and nothing appears to rebut the presumption of the truth of the assertion. So I apprehend a short pedigree stated in a deed fifty years old with possession accordingly, would be sufficient *prima facie* evidence to throw the *onus* of disputing the recital on the purchaser; and if he cannot gainsay it, he must accept the title; still the expense of answering his observations and remarks on the pedigree, which by search or otherwise he has collected, must be borne by the vendor; and if enough be adduced to raise a fair:

objection to the recited pedigree, which the vendor cannot overcome and the title is rejected, the whole expense of the investigation is thrown on the vendor, and may, I apprehend, be recovered of him ; but this subject has been treated of in the chapter on the proof of pedigrees.

Recitals in deeds forty or fifty years old of births, marriages, and heirships are frequently admitted in evidence, particularly where the transaction is not very important, and the expense of furnishing the best evidence would be considerable ; and it may be said to be the constant practice of Conveyancers, on the examination of titles, to receive as evidence, recitals of thirty or forty years standing if the possession has been accordingly and there are corroborative circumstances strengthening the presumption that the facts agree with the recitals<sup>e</sup>. If in 1770 A. executes a mortgage in fee to B. ; and in a deed of reconveyance or transfer, it is stated that B. is dead, and that C. is his heir and D. his executor, who both join in the reconveyance or transfer, the evidence requisite to support this recital is an official copy of B.'s will, if it be executed in the presence of three witnesses, to shew first, the appointment of executors, and second, that it contains no devise of the legal estate ;—on that appearing, it may be safely assumed on the faith of this recital in a deed between forty and fifty years old, that C. is B.'s heir at law as stated, it being clear that the money is repaid to the right hand and that the legal estate is not outstanding in a devisee. If the mortgagee's will be not executed in the presence of three witnesses, then official extract shewing the appointment of executors is all that can

be required, for it will then be clear that the legal estate is not devised and that it must have descended to the heir at law who is a mere trustee, and after a lapse of forty years undisturbed enjoyment, it must, and would no doubt in court be assumed, that the party professing to be the heir is really so and of age, until the contrary appears ; and *that*, though he be described as a mere cousin—a trick not uncommon with the older Conveyancers, who left it to posterity to disprove a relationship stated and acknowledged at the time.

But the recital in one deed, cannot, I apprehend, be given in evidence to contradict a recital in another deed; each deed must be construed by the evidence contained within its four corners. Thus where a testator gave lands to his widow for life, with remainder to A. and B. in fee in equal moities, and in 1786, D. by indenture (reciting that he was eldest son of C. who was eldest son of B.; and that C. had gone abroad and had never been heard of since) conveyed his moiety of the lands to a purchaser, and in the same year A. by indenture reciting that B. had died *without issue*, conveyed his moiety to another purchaser, this gratuitous recital of B.'s death *without issue* in a deed not affecting the title, could not it is submitted be read in evidence against a statement made by one of the family in a material deed supported by many years consistent possession.

A recital in a copyhold admission forty years old is entitled to greater weight than a recital in a private deed ; for the admission is made in court before the homage, persons well versed in parish politics, and

these being sworn to present the truth, would never admit a gross misstatement on the rolls. Such a recital is not therefore to be treated lightly.

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3.---*Voluntary Affidavits.*

Voluntary affidavits are frequently resorted to and required by Conveyancers under a choice of difficulties, in support of facts and averments when more direct proof cannot be obtained. As legal evidence these documents are clearly inadmissible ; first, they are purely voluntary and not being made in any adverse process in court, they will not sustain an action for perjury,—the only temporal punishment for false swearing, and which being removed, consequently destroys one powerful incentive to the elucidation of truth; Second, they are made expressly to support a point, and are therefore on the face of them not of that pure and disinterested character which is expected from unexceptionable evidence; and third, they frequently contain nothing more than hearsay evidence, and are often made by parties who are not relations or members of the family, but mere acquaintances ; nevertheless the Conveyancer freely admits this testimony as corroborative evidence of general reputation and concurrent possession, and the probabilities certainly are in favour of a deliberate *oath* ; which is the *bond* of all society. It should appear on the face of the affidavit that the deponent is likely to be acquainted with the facts, and reasonable grounds should be stated for his belief<sup>f</sup>. Forms of a few affidavits of this kind are inserted in the appendix.

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4.---*Presumptions.*

The maxim at law is, that truth and justice shall be presumed rather than fraud and error, the courts never



presume a wrong but they frequently presume a right, leaving it to the parties interested to rebut that presumption by shewing the contrary. Thus possession is *prima facie* evidence of property, but the landlord may prove that the occupier is his tenant by shewing a payment of rent or other acknowledgment. In favour of antient grants and long uninterrupted possession, presumptions of the most solemn assurances have frequently been made to meet the justice of the case. Thus, before the statute 9 Geo. iii. c. 16, Lord Mansfield C. J. held, that a possession and enjoyment for a hundred years were evidence in support of a title, even against the crown; for though such possession could not conclude as a positive bar, because there was no statute of limitation against the crown, yet it might operate against the crown as evidence of right in the defendant, if the claim could have a legal commencement<sup>s</sup>. Upon the same principle, uninterrupted enjoyment of an easement for twenty years or upwards, is strong evidence of a right of enjoyment, from which juries are directed by the court to presume a conveyance or agreement.

Some presumptions are founded on the lapse of time, as the foregoing; others, on common experience. Of the latter kind, the assent of the recipient of a benefit to the conveyance is a necessary presumption, and therefore it is presumed that the dower-trustee has accepted the trust till his actual disclaimer be shewn; consequently his concurrence in the subsequent conveyance cannot be necessary; for it is only in case he actually disclaims that the object of the trust can be evaded.

So by common experience it is found to be a neces-

sary presumption that a person of the same name and conveying the same interest as that limited to a person previously mentioned, is the same person. To require proof of the fact on every conveyance would be destructive of all confidence. The person preparing the abstract usually inserts the word 'said' without any direct knowledge or proof that it is the same person; but unless there be a great interval between any two deeds or assurances, evidence of identity is seldom called for; if such a chasm exist it may be proper to require evidence of the occupation during the interval, which can only be supplied by recital or some other oral and voluntary testimony. Affidavits of identity in support of parish registers are sometimes required, but I doubt if this requisition can be insisted on, according to the usual practice, unless some reason for such collateral proof be adduced; as that several persons of the same name were residing in the parish at the same time or the like. It is also a necessary presumption that the parties filled the characters attributed to them in the antient deeds as before noticed (303.)

The presumption that a legacy, portion, or other charge is satisfied after twenty years non-claim is proposed to be established by express enactment in a bill now before parliament<sup>h</sup>.—The subject of this section has occupied the attention of a learned and elegant cotemporary Writer, to whose work 'On the doctrine of Presumption and presumptive evidence' it is merely necessary to refer here.

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*5.---Proposed Alterations.*

It remains to add a few concluding observations on the proposed alterations in the proof of documentary

evidence in and out of court. The common-law commissioners in their second report have proposed a plan, by which a party intending to rely on the authenticity of deeds as part of his title, may save himself the expense and trouble of producing the witnesses to prove the execution of the deeds or the truth of a copy on the trial, by giving notice to the adverse party that he intends to produce the deeds and papers mentioned in the schedule at a certain time and place, where it will be required of him to admit the due execution of the deeds and the truth of such of them as purport to be copies, or in default thereof to appear before a judge to make such admission ; but the adverse party is not to be compelled to make these admissions ; the object being merely to give the party not in possession of the deeds a fair opportunity of inspecting them, and by that means, if he will admit their authenticity without proof (as in most cases he is found to do on trial), the attendance of the witnesses may be dispensed with.

This is not a very effective provision, for the defendant may refuse to acknowledge the execution, and as a dispassionate contest can seldom be reckoned on, each party will very reluctantly admit any point which would save his adversary either expense or trouble. Each party builds some hope of success on a default of proof in the other side as well as on the merits of his own case ; and to suppose a person will deprive himself of even the slender chance of that benefit is not borne out by experience.

The Real Property Commissioners propose a much more efficient plan for the proof of deeds, the inconveniences of which, as at present established in court, both

Commissioners denounce. One advantage of a general registry, they urge, consists in relieving parties from the great difficulty at present experienced in finding original documents and enforcing their production when they are required to be given in evidence. They therefore propose that office copies of original documents, certified by the proper officer, and under the seal of the register office, of which judicial notice is to be taken, should be evidence of the contents, and of the due execution of the original, unless objected to after notice of the intention to use them, conformably to the suggestions respecting original deeds contained under the head 'Verification of Documents,' in the report above referred to; and they think that the party objecting should be allowed either to require the original to be proved or simply to be produced<sup>i</sup>. These recommendations if followed, will make considerable alterations in the nature of evidence, as indeed the establishment of a 'General Register' will completely change the present system and practice of Conveyancing; but though perhaps they may be ultimately adopted, the period of their establishment must necessarily be from many causes comparatively remote.

eldest son of the said L. M. and as such the heir of the said C. D.), took possession of the said farm and lands and hath ever since been in the quiet and peaceable possession of the same.

Sworn before

R. S. Master Extra

in Chancery,

the day of 1832.

### *AFFIDAVIT as to the Identity of Parcels.*

A. B. of &c. labourer, maketh oath and saith that he is 70 years of age last birth day ; that he hath resided forty years in the parish of Ham, in the county of York ; that he is well acquainted with the farm and lands called Toothill, having worked thereon for many years ; and this deponent further saith that he recollects the hedge between the Sandy-piece and the Nythe being grubbed up many years ago, he having assisted in the same, on which occasion the said two pieces of land were laid into one and ploughed up and sowed with vetches, and the said piece of land so united hath ever since been called and is now known by the name of the Sandy-piece, and contains by reputation seven acres or thereabouts ; and this deponent further saith that the said farm and lands have been in the occupation of C. D. as tenant to E. T. for the last twelve years or thereabouts, and before that time the said farm and lands were in the occupation of G. H. who died there. Dated, &c.

Sworn, &c.

### *AFFIDAVIT that a particular Messuage was in a certain Family forty years ago.*

J. W. of, &c. yeoman, maketh oath and saith that he was born in the month of April, 1750, and that he this deponent is the son of J. W. late of F. aforesaid, and Elizabeth his wife (formerly Elizabeth L., spinster) both long since deceased, and that ever since he can remember he has known a certain messuage or tenement, orchard, piddle of ground, and other hereditaments, situate in the tithing of H. in the parish of B. in the county of E. ; and that the same were formerly in the occupation of R. Y. and afterwards of J. P. and are now in the occupation of J. C. ; which this deponent hath been informed and verily believes was formerly the estate and inheritance of one W. B., afterwards of this deponent's said mother Elizabeth W. ; and this deponent further saith that he remembers the rents of the said estate being paid to and received

by this deponent's said father during his life, and after his death the rents of the said estate were received by and paid to this deponent's said mother.—Dated, &c.

### AFFIDAVIT *attesting the truth of a Parish Register.*

Sworn, &c.

A. H. clerk to D. C. of, &c. gentleman, maketh oath and saith that he this deponent hath carefully compared and examined the paper-writing hereto annexed [*or above written*] with the original entry thereof in the books for the register of baptisms kept at A. in and for the parish of B. and that the same is a true and correct copy therefrom in the words and figures as the same doth appear in the said registry; and that he this deponent was present and did see the Rev. I. B. curate or minister of the said parish extract the same from the said registry with his own hand and afterwards sign the same with his own proper hand, and that the name I. B. thereunto set and subscribed is of the proper hand-writing of the said I. B.—Dated, &c.

Sworn, &c.

### *Another Form.*

“The Year 1804.

“No. 16, Benjamin Cooper of this parish, single man, a minor, with consent of parents, and Matilda Deer, of the parish of Charsfield, single woman, were married in this church by license, this thirteenth day of August, in the year of our Lord one thousand eight hundred and thirty-four, by me William Brown, rector.

This marriage was solemnized between us	Benjamin Cooper. Matilda Deer.
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In the presence of	Mary Cooper. John Howard.
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“1807.

“Cooper—Matilda, the wife of Benjamin Cooper, (late Matilda Deer, spinster,) aged 24 years, was buried February 12th.”

The above is extracted from the register of the burials in the parish of Wickham Market, in county of Suffolk, by me

A. B. Curate.

C. D. of, &c. gent. maketh oath and saith that the above certificate of the marriage of Matilda Deer with Benjamin Cooper, is a true copy of an entry made in the book kept by the rector, of the parish of D. in the county of S. for registering marriages in the said parish, so far as relates to the marriage of the said Matilda Deer with the said Benjamin Cooper. And

this deponent further saith that the above extract of the burial of the said Matilda Deer, then Matilda Cooper, is a true copy of an entry made in the books kept by the curate of the parish of D. aforesaid, for registering burials in the said parish, so far as relates to the burial of the said Matilda Cooper. And this deponent further saith, that he carefully examined and compared the said two several extracts with the respective books from which they were taken.—Dated, &c.

Sworn, &c.

### *AFFIDAVIT of Identity.*

A. B. of, &c. maketh oath and saith that he well knew James Smith, late of, &c. deceased, and that he died on or about the 5th day of April, 1813, and he hath been informed and verily believes that the said James Smith is the same James Smith as is mentioned in the extract from the books kept for registering burials in the said parish hereunto annexed.—Dated, &c.

Sworn, &c.

## NOTES AND REFERENCES.



### INTRODUCTORY OBSERVATIONS.

PAGE.

1. copy <sup>a</sup>. . . . . Rex v. Barnes, 1 Stark, N. P. C. 243. 2 Camp. 388.
2. chancery <sup>b</sup>. . . Barford v. Street, 16 Ves. 135.

### CHAPTER I.

#### PROOF OF DEEDS.

4. provisions <sup>c</sup>. . . Doe d. Oldham v. Woolley, 8 B. & C. 22. 2 T.R. 471. Bull. N. P. 255 a. Swinnerton v. Stafford, 3 Taunt. 91. Wynne v. Tyrwhitt, 4 B. & A. 376. Benson v. Olive, Bunb. 285. 1 Phil. Ev. 458. 1 Stark. Evid. 343.
- ... time <sup>d</sup>. . . . . Rex v. Ryton, 5 T.R. 259. Fry v. Wood, 1 Selw. N.P. 535. Ely D. & C. v. Stewart, 2 Atk. 44. 4 B. & A. 377.
- ... writings <sup>e</sup>. . . . . Chelsea Water Works, C. v. Cowper, 1 Esp. N.P.C. 275. 2 Atk. 44. 1 Selw. N.P. 535. Manby v. Curtis, 1 Price 232, Birtie v. Beaumont, 2 Price, 308. Bullen v. Michel, 2 Price, 399. 4 Dow, 297. 4 B. & A. 376. 1. Phil. Evid. 458.
- ... obtained <sup>f</sup>. . . . . Vin. Abr. Tit. Evid. (A. b. 5.) cited 7 East, 291. Bull, N.P. 255. Forbes v. Whale, 1 W. Bl. 532. 1 Esp. N.P.C. 278. 4 B. & A. 376.
7. him <sup>g</sup>. . . . . Groves v. Groves, 3 Yo. & J. 163. Curtis v. Perry, 6 Ves. 739.
- ... limitations <sup>h</sup>. . . 32 H. VIII. c. 2. s. 3.
8. conveyance <sup>i</sup>. . . Chettle v. Pound, Bull. N.P. 255, a. S.C. 1 Ld. Ray. 746. Gilb. Evid. 103.
12. Yates <sup>j</sup>. . . . . Marsh v. Colnett, 2 Esp. N.P.C. 665.
- ... called <sup>k</sup>. . . . . 1 Selw. N.P. 492. 535. 5th ed.
- ... years <sup>l</sup>. . . . . Doe d. Oldham v. Woolley, 8 B. & C. 22. 1 Phil. Evid. 460. 6th ed.
16. possession <sup>m</sup>. . . 32 H. VIII. c. 9.
- ... deed <sup>n</sup>. . . . . Wyndham, Jus. said he had seen many deeds in the time of Queen Elizabeth without witnesses. 1 Lev. 25.
17. proved <sup>o</sup>. . . . . Fasset v. Brown, Pea. N.P.C. 33. [24.]
19. frauds <sup>p</sup>. . . . . 29 Car. II. c. 3.



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19. only *q* . . . . . *Prest. Shep. Tou.* 57.—If a deed be signed by a mark, the inference is, that the party cannot read; it should therefore appear by the attestation, or by a separate affidavit, if the attestation be silent as to the fact, that the deed has been read over and explained to the party, and that he usually signs his name by a cross. An instrument executed by a mark may be proved from inspection by a person who has frequently seen the party so execute a deed, *George v. Surrey*, 1 Moo. & Malk. 516. *Doe v. Cleveland*, 9 B. & C. 869. *Mitchell v. Johnson*, 1 Mo. & Malk. 176. A marksman is a sufficient witness to a will within the statute of frauds. *Wright v. Wright*, 7 Bing. 458. *Addy v. Grix*, 8 Ves. 534. 185. The Bank of England requires the minister of the parish and one churchwarden, or both the churchwardens without the minister to attest powers of attorney executed by a mark, and the attestation must shew that the power has been read over to the party and fully explained. To affix a name to a mark without proper authority should seem to be a forgery, *Argo*. 9 Price, 635.
20. good *q* . . . . . *Mc. Queen v. Farquhar*, 11 Ves. 467, 478. In *Rist v. Hobson*, 1 Sim. & Stu. 543, signature was presumed.
21. indentation *r*.. *Sug. Pow.* 236, 3rd ed. *Matt. Presump.* 36.  
 . . . delivered *s*.. . . . *Talbot v. Hodson*, 7 Taunt. 251.
22. deed *t* . . . . . *Pigott's Ca.* 11 Co. 27 a.  
 . . . deed *u* . . . . . *Bull. N.P.* 267. 11 Co. 27. 2 Stark. Evid. 476.  
 . . . instrument *v*.. *Bull. N.P.* 267. 10 Co. 92 b. 11 Co. 27 a.  
 . . . same *w* . . . . . 11 Co. 28 b. *Bull. N.P.* 267.  
 . . . *Fauconberg x*.. *Fitzg.* 207, 223.  
 . . . *Paget y*.. . . . 2 Ch. Rep. 410.
23. deed *z* . . . . . *Sanderson v. M'Cullum*, 4 J.B. Moore, 7.  
 . . . stamp act *a* . . . *Hall v. Chandless*, 4 Bing. 123.  
 . . . registry act *b*.. 7 Anne, c. 20, 1708.  
 . . . registry act *c*.. 8 Geo. II. c. 6. 1735. 2 & 3 Anne, c. 4, 1702. 5 & 6 Anne, c. 18, 1765. 6 Anne, c. 35.
25. registration *e*.. *Wiseman v. Westland*, 1 Yo. & Jer. 117. *Hodgson v. Dean*, 2 Sim. & Stu. 221. *Crymble v. Adair*, 1 Beat. 122. 2 Pow. Mort. 631.  
 . . . presumption *d*.. Argument to the contrary disregarded in *Doe v. Hirst*, 11 Price, 492.  
 . . . stamped *e* . . . . 5 W. & M. c. 21. s. 11. 5 Geo. III. c. 184, s. 8.
31. received *f* . . . . *Paddock v. Fradley*, 1 Crompt. & Jerv. 90.  
 . . . under it *g* . . . . *Plaxton v. Dare*, 10 B. & C. 17. *Townshend v. Champernown*, 1 Yo. & Jer. 539.
33. said *h* . . . . . *Per Best, C.J.* 1 Ry. & Moo. 89. See also *Pea. Ev.* 112.  
 . . . contradict it *i*.. *Eden v. Bute*, 7 Br. P.C. 745. 3 *ib.* 679. *Tom. ed.* *Shelburne v. Inchiquin*, 1 Bro. Ch. Ca. 341.
34. acceptance *j*.. *Vaugh.* 169.  
 . . . cases *k* . . . . . Of which the following are the more prominent, *Doe v. Oxenden*, 3 Taunt. 147. 4 Dow, 65. *Walpole v. Cholmondeley*, 7 T.B.

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138. *Goodtitle v. Southern*, 1 Mau. & Selw. 299. *Whitebread v. May*, 2 Bos. & Pull. 593. *Beaumont v. Field*, 1 Barn. & Ald. 247. *Paddock v. Fradley*, 1 Crompt. & Jer. 96. *Doe v. Jersey*, 1 Barn. & Ald. 550. *Doe v. Wilford*, 1 Ry. & Moo. 88. *Press v. Parker*, 2 Bing. 461.
34. *concesserunt*<sup>l</sup>. *Day v. Fynn*, Owen, 133.
35. so much <sup>m</sup>. . . . . *Winch v. Winchester*, 1 Ves. & Bea. 375.
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- . . . . bound <sup>g</sup> . . . . Gore v. Stackpole, 1 Dow P.C. 31.
239. instalments <sup>h</sup>. Amos v. Hill, 2 Bos. & P. 150. Rearden v. Swabey, 4 East, 188. 1 Wm. IV. c. 7. 1831.
240. devisees <sup>i</sup> . . . . 3 & 4 Wm. & M. c. 14.
- . . . . declared <sup>j</sup> . . . . 1 Wm. IV. c. 47, 16th July, 1830.
- . . . . covenant <sup>k</sup> . . . . The provision in the 3 & 4 W. & M. was confined to an action of debt, and it was held in Wilson v. Knubley, 7 East, 127, that an action of covenant did not lie. The late act extends the remedy to covenants, 1 W. IV. c. 47. s.
241. devise <sup>l</sup> . . . . 1 Wm. IV. c. 47, ss. 2, 3, 4, 5.
- . . . administrators <sup>m</sup> *Ibid* ss. 6, 7, 8.
242. *passu* <sup>n</sup> . . . . See cases collected in 2 Pow. Mortg. 890.
- . . . . act <sup>o</sup> . . . . 1 Wm. IV. c. 47. s. 9.
244. bankruptcy <sup>p</sup>. 6 Geo. IV. c. 16. s. 81.
- . . . . demand <sup>q</sup> . . . . Birket exp. 2 Rose, 71. Bowness exp. 2 M. & S. 479.
- . . . . acts <sup>r</sup> . . . . 46 Geo. III. c. 135. s. 1. 49 Geo. III. c. 121. s. 2.
- . . . . superseded <sup>s</sup> . . . . Moule, exp. 14 Ves. 602. Binner, exp. 1 Madd. 250. Staff, exp. Buck, 431.
245. creditors <sup>t</sup> . . . . Gulston, exp. 1 Atk. 193. 4 Camp. 286. 1 Stark. 144.
- . . . . outlawed <sup>u</sup> . . . . Bradford v. Bloodworth, 1 Keb. 11. 1 Lev. 13.
- . . . . arrest <sup>v</sup> . . . . 6 Geo. IV. c. 16. s. 5.
246. with <sup>w</sup> . . . . Hassel v. Simpson, 1 Bro. C.C. 99. Devon v. Watts, 1 Doug. 87. 89.
248. purchaser <sup>x</sup> . . . . 6 Geo. IV. c. 16. s. 6.
249. issue <sup>y</sup> . . . . Lowes v. Lush, 14 Ves. 547. Franklin v. Brownlow, 14 Ves. 550.
- . . . . purchase <sup>z</sup> . . . . De Golls v. Ward, Ca. T.T. 243. 7 Vin. Abr. 121.
250. vendors <sup>a</sup> . . . . M'Donald v. Hanson, 12 Ves. 277.
- . . . . purchaser <sup>b</sup> . . . . Turner v. Hervey, Jac. 178.
251. pending <sup>c</sup> . . . . Thomas, exp. 2 Glyn. & Jam. 278.
- . . . . action <sup>d</sup> . . . . Thomas, exp. 1 Mont. & M'Arth. Bank. Ca. 64.
255. void <sup>e</sup> . . . . Doe v. Andrews, 4 Bing. 351.
256. void <sup>f</sup> . . . . Sharpe v. Thomas, 6 Bing. 416.
258. copy <sup>g</sup> . . . . Carpenter v. White, 3 J. Moore, 231.
259. title <sup>h</sup> . . . . Delafield v. Freeman, 6 Bing. 294.
- . . . . otherwise <sup>i</sup> . . . . Gould v. Hume, 3 Car. & Pay. 625. Jones v. Nichols, 2 Man. & Ry. 12.



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259. auction <sup>j</sup> . . . . 7 Geo. IV. c. 57. s. 20.  
 . . . . leaseholds <sup>k</sup> . . . . Waldron v. Howell, 3 Rus. 376.
260. run <sup>l</sup> . . . . . Kettle v. Hammond, Bull N.P. 40. 4 Burr. 2240. 16 Ves. 148.
261. right <sup>m</sup> . . . . . Power v. Shiel, 1 Beatt. 48.
263. rectify <sup>n</sup> . . . . . Goodtitle v. Morgan, 1 T.R. 762.  
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 . . . . V. C. P. . . . . Harper v. Faulder, 4 Madd. 132.
264. deeds <sup>q</sup> . . . . . 4 Madd. 138.  
 . . . . years <sup>r</sup> . . . . . Albemarle v. Purbeck, Finch, 252. Southcot v. Southcot, 1 Chan. Rep. 108. Wynn v. Williams, 5 Ves. 130. Bill in parliament making 40 years an unanswerable bar. 23rd Aug. 1831.
268. require <sup>s</sup> . . . . . Emery v. Grocock, 6 Madd. 54. Math. Port. 218.  
 . . . . necessary <sup>t</sup> . . . . Eldridge v. Knott, Cowp. 214.  
 . . . . to it <sup>u</sup> . . . . . Co. Litt. 115 a; and Harg. n. 5.  
 . . . . presumed <sup>v</sup> . . . . Read v. Brookman, 3 T.R. 151. 2 Sch. & Lef. 106. Simpson v. Gutteridge, 1 Madd. 609.
269. act <sup>w</sup> . . . . . 42 Geo. III. c. 116. s. 38.
270. accordingly <sup>x</sup> . . . . Monday v. Harley, M.S. K.B. 1827. 42 Geo. III. c. 116. s. 123.  
 . . . . representative <sup>y</sup> 42 Geo. III. c. 116. s. 154.  
 . . . . trustees <sup>z</sup> . . . . Fortescue in Re. 3 Rus. 128. Ware v. Polhill, 11 Ves. 276. et vide, 19 Ves. 118. Sparkes, exp. 1 M'Lel. 518.  
 . . . . act <sup>a</sup> . . . . . 42 Geo. III. c. 116.  
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271. accordingly <sup>c</sup> . . . . 57 Geo. III. c. 100. s. 24. 1817. See also a similar clause in 42 Geo. III. c. 116. s. 120.  
 . . . . them <sup>d</sup> . . . . . These sections have been commented on in Croydon Hospital v. Farley, 6 Taunt. 482.

## CHAPTER VII.

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 . . . . inheritance <sup>b</sup> . . . . Co. Litt. 243 a. Goodtitle v. Newman, 3 Wils. 516. Co. Litt. 15 a.
276. period <sup>c</sup> . . . . . Doe d. Smith v. Cartwright, 1 Ry. & Mo. 62. S.C. 1 Car. & P. 218.
277. abroad <sup>d</sup> . . . . . Colvin v. Fraser, 1 Hag. Ecc. Rep. 107.
279. suit <sup>e</sup> . . . . . French v. French, 1 Dick. 268. Thompson v. Donaldson, 3 Esp. Moons v. Bernales, 1 Rus. 301. 10 Ves. 289. seems contra.
- .. living <sup>f</sup> . . . . . See Zachariah v. Page, 1 B. & A. 386.
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285. disprove it<sup>l</sup> . . . Rex v. St. Peter's, 1 Bott. 454. Bull. N.P. 112. Goodnight v. Moss, Cowp. 593. Henley v. Chesham, 2 Bott. 70. Standen v. Standen, 2 Pea. N.P.C. 45. 30. Rex v. Bramley, 6 T.R. 330.  
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286. grounds<sup>o</sup> . . . Doe v. Flemming, 4 Bing. 266. 8 Ves. 417. 2 Stra. 1073.  
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287. issue<sup>r</sup> . . . . Doe v. Griffin, 15 East, 293.  
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 . . . . evidence<sup>c</sup> . . . . Pendril v. Pendril, 2 Stra. 924. Bull. N.P. 113 a. 287 a. 1 M. & S. 689. Doe v. Ridgeway, 4 B. & A. 53.  
 . . . . said<sup>d</sup> . . . . Whitelock v. Baker, 13 Ves. 514.
294. pedigree<sup>e</sup> . . . . Johnson v. Lawson, 2 Bing. 86.  
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296. refer<sup>i</sup> . . . . Banbury Peerage, 1 Sim. & Stu. 159.  
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297. known<sup>m</sup> . . . . Per Lord Redesdale, 4 Camp. 421.  
 . . . . true<sup>n</sup> . . . . Doe d. Cracknel v. Head, M.S. K.B. 4th Feb. 1823.

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297. tomb-stones <sup>o</sup>. *Baxter v. Foster*, Vin. Ab. Ev. T. b. 87. Cowp. 593.  
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 .... purpose <sup>q</sup> .... *Taylor v. Cole*, 7 T.R. 3 n.  
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 .... Elizabeth <sup>x</sup> ... 3 Burn. Ecc. L. 257. Gilb. Evid. 68.  
 .... church <sup>y</sup> .... Can. 70. 3 Burn. Ecc. L. 257.  
 .... approved <sup>z</sup> ... Gib. Cod. tit. 18, c. 9. 5 B. & C. 509.  
 .... act <sup>a</sup> .... 26 Geo. II. c. 33, s. 14. 4 Geo. IV. c. 76.  
 307. Chanccllor <sup>b</sup>.. Can. 70. Gib. Cod. p. 204.  
 .... enacted <sup>c</sup> .... 4 Geo. IV. c. 76. 52 Geo. III. c. 146, s. 7.  
 .... note <sup>d</sup> .....

BAPTISMS solemnized in the Parish of St. A. in the County of B. in the Year One Thousand Eight Hundred and Thirty-one.						
When Baptised	Child's Christian Name	Parents Names		Abode	Quality, Trade, or Profession	By whom the Ceremony was performed
		Christian	Sirname			
1831 1st Feb. No. 1.	John Son of	William Elizabeth		Lambeth		
3rd March No. 2.	Ann Daughter of	Henry Martha		Fulham		

BURIALS in the Parith of A. in the County of B. in the Year One Thousand Eight Hundred and Thirteen.				
Name.	Abode.	When buried.	Age.	By whom the Ceremony was performed.
John Wilson, No. 1.	Duke Street, Westminster,	1813, 1st May.	62.	

MARRIAGES solemnized in the Parish of St. A. in the County of B. in the  
Year One Thousand Eight Hundred and Thirteen.

*A. B. of* { *the* } *Parish*  
                   { *this* }  
*and C. D. of* { *the* } *Parish*  
                   { *this* }  
*were married in this* { *Church* } *by* { *Licence* } *with consent of* { *Guardians*  
                                   { *Chapel* }           { *Banns* }               { *Parents*  
*this*                               *day of*                               *in the Year*  
By me, I. I. { *Rector*  
                              { *Vicar*  
                              { *Curate*  
This marriage was solemnized { *A. B.*  
   *between us* } *C. D.*  
*In the presence of* { *E. F.*  
                                   { *G. H.*

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307. persons <sup>e</sup> . . . . Bull. N.P. 27 a.  
 . . . . Wingfield <sup>f</sup> . . 18 Ves. 443.  
 . . . . baptism <sup>g</sup> . . . Doe d. Warren v. Bray, 8 B. & C. 813.  
 . . . . pleaded <sup>h</sup> . . . . Copps v. Follon, 1 Phill. Ecc. Rep. 145. 1794.  
 308. act <sup>i</sup> . . . . . 52 Geo. III. c. 146.  
 . . . . evidence <sup>j</sup> . . . Reed v. Passer, Pea. N.P.C. 303.      S. C. 1 Esp. 213.      Lloyd  
                                   v. Passingham, 1 Coop. Ch. Ca. 155.      16 Ves. 59.      1 Esp.  
                                   N.P.C. 197.  
 . . . . law <sup>k</sup> . . . . . Huet v. Le Mesurier, 1 Cox, 275.  
 . . . . abroad <sup>l</sup> . . . . Leader v. Barry, 1 Esp. N.P.C. 333.  
 . . . . custody <sup>m</sup> . . . Newham v. Raithby, 1 Phill. Ecc. Rep. 315.      Doe d. Warren  
                                   v. Bray, 8 B. & C. 818.  
 . . . . produced <sup>n</sup> . . 1 Phill. Ecc. Rep. 315.  
 309. copy <sup>o</sup> . . . . . Bicheno Diss. Reg. 25.  
 310. facts <sup>p</sup> . . . . . Blunt exp. 1 West, 30. et vide 1 Salk. 281.  
 . . . . evidence <sup>q</sup> . . . Earl of Thanet's case, 2 Jones, 224, and Vin. Ab. T. b. 87, and  
                                   see Zouch v. Waters, *ib*.  
 . . . . kept <sup>r</sup> . . . . . Meyner v. Droitwich, Skin. 623, but see 12 Vin. Ab. 87, for some  
                                   observations on this case.

## CHAPTER VIII.

## OF SECONDARY EVIDENCE AND NECESSARY PRESUMPTIONS.

312. contents <sup>a</sup> . . . Brewster v. Sewell, 3 B. & A. 296. et vide as to reasonable diligence  
                                   in a search, Rex v. Farleigh, 6 Dow & Ry. 147.      3 Bligh, 41.  
                                   4 Bing. 290.      1 Dow N.S. 190.  
 314. examination <sup>b</sup> Bull. N. P. 226 b. 229.

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- 315.** party<sup>e</sup>. . . . . 3 Stewart's Conv. 390.  
 .... authorities<sup>d</sup>. . 1 Stark. Evid. 369. Peake Evid. 108. 1 Phil. Evid. 138.  
**317.** recitals<sup>e</sup>. . . . . Dundas v. Dutens, 1 Ves. Jun. 196. Cordwell v. Mackrill, Amb. 515.  
**319.** belief<sup>f</sup>. . . . . Randolph v. Gordon, 5 Price, 316.  
**320** commencement<sup>g</sup>. Rex v. Brown, Cowp. 110.  
**321.** parliament<sup>h</sup>. . A bill for the amendment of the law of inheritance, ordered to  
                                 be printed 23rd Aug. 1831.  
**323.** produced<sup>i</sup>. . . Real Prop. Com. 2nd Rep. p. 43.

## ERRATA.

Page.	line.	
36,	21,	<i>for particular read particular a.</i>
87,	29,	<i>for children read issue of children.</i>
132,	16,	<i>for nullity read nullity a.</i>
201,	18,	<i>for gaining read gaming.</i>

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